99-6723

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

No. 99-

ANTHONY BRADEN BRYAN,
Petitioner,

versus,

MICHAEL MOORE, Secretary,
Florida Department of Corrections,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

---

*GREGORY C. SMITH
Fla. Bar No. 027908O
Capital Collateral Counsel
Northern Region

ANDREW THOMAS
Fla. Bar No. 0317942
Chief Assistant

Capital Collateral Counsel
Northern Region
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(850) 488-7200

Attorneys for Anthony Braden Bryan
*Counsel of Record

RECEIVED
OCT 2 2 1999
OFFICE OE THE CLERK
SUPREME COURT, U.S.

CAPITAL CASE

QUESTIONS PRESENTED

Four members of the Florida Supreme Court believe that the Eighth Amendment will not be violated by Anthony Braden Bryan's execution by electrocution on October 27, 1999, in Florida. Three members of the Florida Supreme Court believe that the Eighth Amendment will be violated by Bryan's execution. This disagreement resulted in seven separate opinions below, and presents the following questions:

1. **Did the Florida Supreme Court's appraisal of the likelihood that Mr. Bryan will suffer needless agony and degradation when he is put to death by Florida's electric chair violate the Eighth Amendment by disregarding a constitutionally unacceptable risk of physical violence, disfigurement and torment?**

2. **Did the Florida Supreme Court err in concluding that the record as a whole insufficiently sustains Mr. Bryan's contention that his execution by Florida's electric chair unnecessarily exposes him to physical suffering and degradation in violation of the Eighth Amendment?**

3. **Following the documented, repeated malfunctioning of Florida's electric chair, resulting in ghastly spectacles of violent disfigurement, did the Florida Supreme Court err in rejecting Mr. Bryan's contention that his being subjected to execution by such means constitutes wanton psychological and moral cruelty that violates the Eighth Amendment?**

4. **Did the Florida Supreme Court err in determining that the presence or absence of conscious pain once electrocution begins is the only factor which determines whether or not Florida's electric chair constitutes cruel and unusual punishment under the Eighth Amendment?**

TABLE OF CONTENTS

Page

CAPITAL CASE i

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION OF SUPREME COURT OF FLORIDA 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Course of Proceedings 2

B. Decisions by the Lower Court 3

Jesse Tafero 4

Pedro Medina 5

Allen Lee Davis 5

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Beck v. Alabama,
447 U.S. 625 (1980) 10

Bryan v. Moore,
1999 WL _____ (Fla. Oct. 20, 1999) 2

Buenoano v. State,
565 So.2d 309 (Fla. 1990) 3, 4, 13

Estelle v. Gamble,
429 U.S. 97 (1976) 17

Farmer v. Brennan,
511 U.S. 825 (1994) 18

Francis v. Resweber,
329 U.S. 459 (1947) 18

Furman v. Georgia,
408 U.S. 238 (1972) 10

Glass v. Louisiana,
471 U.S. 1080 (1985) 14

Gregg v. Georgia,
428 U.S. 153 (1976) 18, 19

Helling v. McKinney,
509 U.S. 25 (1992) 17

Hudson v. Palmer,
468 U.S. 517 (1984) 18

In re Kemmler,
136 U.S. 436 (1890) 10

Jones v. State,
701 So.2d 76 (Fla. 1997) 3, 5, 13

Lewis v. Jeffers,
497 U.S. 764 (1990) 12

Lockett v. Ohio,
438 U.S. 586 (1978) 10

Louisiana ex rel. Francis v. Resweber,
329 U.S. 459 (1947) 10, 18

Maynard v. Cartwright,
486 U.S. 356 (1988) 12

Palko v. Connecticut,
302 U.S. 319 (1937) 18

Provenzano v. Moore,
No. 95,973 (Fla. 1999) 2, 3, 13

Rhodes v. Chapman,
452 U.S. 337 (1981) 18

Robinson v. California,
370 U.S. 660 (1962) 10

Trop v. Dulles,
356 U.S. 86 (1958) 10, 18

Weems v. United States,
217 U.S. 349 (1910) 18

Wilkerson v. Utah,
99 U.S. 130 (1878) 18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

No. 99-

ANTHONY BRADEN BRYAN,
Petitioner,

versus,

MICHAEL MOORE, Secretary,
Florida Department of Corrections,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Anthony Braden Bryan petitions this Court for a writ of certiorari to review the decision of the Supreme Court of Florida.

OPINION OF SUPREME COURT OF FLORIDA

The opinion of the Florida Supreme Court was entered on October 20, 1999 and is reported at *Bryan v. Moore*, 1999 WL _____ (Fla. Oct. 20, 1999); No. 96,678, slip op. (Fla. October 20, 1999). It is reprinted here as Attachment A. No motion for rehearing was allowed.

JURISDICTION

The Florida Supreme Court entered its judgment on October 20, 1999. Attachment A. The jurisdiction of this Court is invoked under Section 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution, which provide in relevant part the following:

> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. amend. VIII.

> No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Course of Proceedings

On September 23, 1999, the Governor of Florida directed that the Florida Department of Corrections execute Anthony Braden Bryan. The execution date is October 27, 1999.

The day after the Governor's directive, the Florida Supreme Court issued its decision in *Provenzano v. Moore*, No. 95,973 (Fla. September 24, 1999). The Court had before it the record from the trial court with respect to the most recent "bloody side show"[1] execution of Florida Allen Lee Davis. By a 4-3 majority, and with seven separate opinions, the Court held that the electric chair could continue to operate as the sole manner of execution in Florida. Mr. Bryan is one of two Florida inmates scheduled for electrocution next week on the authority of the 4-3 *Provenzano* decision.

On October 5, 1999, Bryan filed a petition in the Florida Supreme Court challenging his imminent execution by electrocution. Bryan asked that the lower court adopt and consider the

---

[1] *Provenzano v. Moore*, slip op. at 82 (Pariente, J., dissenting).

records contained in its review of previous botched electrocutions[2] and to hold that Bryan's execution by electrocution would constitute a violation of the Eighth Amendment and the Florida constitution. On October 20, 1999, the lower court entered its judgment granting the Motion to adopt Record and/or Take Judicial Notice and denied the Petition.

B. Decisions by the Lower Court

The lower court denied Bryan's petition in accordance with its opinions in *Provenzano*, which is appended hereto at Attachment B. Thus, the *Provenzano* record and decisions are the predicate for Bryan's petition in this Court.[3] They show the following:

Because of the unreliability of the Florida electric chair as a constitutional means of execution, "each time an execution is carried out, the courts wait in dread anticipation of some 'unforeseeable accident' . . . ." *Provenzano v. Moore*, No. 95,973, slip op. at 10 (Harding, C.J., joined by Lewis, J., specially concurring). Florida executions have "complications." *Provenzano v. Moore*, slip op. at 15 (Wells, J., joined by Quince, J., concurring). "Recent executions have revealed one problem after another." *Provenzano v. Moore*, slip op. at 82-83 (Pariente, J., joined by Shaw and Anstead, JJ., dissenting). *See also Provenzano v. Moore*, slip op. at 23 (recognizing need to "eliminate some of the 'ghastliness' associated with the photographs of the Davis body, and eliminate some of the human error that seems to plague this form of execution.")(Quince, J.,

---

[2]See *Provenzano v. Moore*, No. 95,973 (Fla. 1999)(Allen Lee Davis execution); *Jones v. State*, 701 So.2d 76 (Fla. 1997)(Pedro Medina execution). *See also Buenoano v. State*, 565 So.2d 309 (Fla. 1990)(Jesse Tafero execution).

[3]Mr. Provenzano sought review of *Provenzano v. Moore*, No. 95,973 (Fla. 1999), in his petition for writ of certiorari filed in this Court on October 18, 1999. Mr. Terry Sims, scheduled for execution one day before Mr. Bryan, has also petitioned this Court for writ of certiorari. Petitioner believes that it would be appropriate for this Court to consolidate these three Florida cases, and has so requested by separate motion.

joined by Wells, J., concurring); *Jones v. State*, 701 So.2d 76, 82-83 ("spate of malfunctions")(Shaw, J., joined by Kogan, C.J., and Anstead, J., dissenting)(footnote omitted); *Provenzano v. Moore*, slip op. at 25 ("continuing malfunctions and mishaps with this method of execution in Florida")(Shaw, J., joined by Anstead, J., dissenting); *Provenzano v. Moore*, slip op. at 55-56 ("continuing--and apparently unavoidable--mishaps involving Florida's electric chair")(Shaw, J., joined by Anstead, J., dissenting). These continuing "problems," "complications," "mishaps," "errors," and "accidents" have resulted in "[t]he fiery deaths of Jesse Tafero and Pedro Medina and the recent bloody execution of Allen Lee Davis [which] are acts more befitting a violent murderer than a civilized state." *Provenzano v. Moore*, slip op. at 66 (Shaw, J., joined by Anstead, J., dissenting).

Jesse Tafero:

> When Tafero's electrocution began, smoke and flames instantaneously spurted from his head for a distance of as much as twelve inches. The flames and smoke emanated from the area around a metallic skull cap, inside of which was a saline-soaked synthetic sponge meant to increase the flow of electricity to the head. * * * Because of the smoke and flames, officials of the Department of Corrections stopped the first surge of electricity. A second jolt again resulted in smoke and flames spurting from Tafero's head.

Buenoano v. State, 565 So.2d 309, 310-11 (Fla. 1990). "One eyewitness stated that Tafero continued to move and breathe after his head had caught fire." *Buenoano*, 565 So.2d at 314 (Kogan, J., dissenting). "According to Robert H. Kirschner, M.D., Tafero was not dead until the third jolt of electricity was administered and may have remained conscious during the first and second jolts." *Buenoano*, 565 So.2d at 315 (Kogan, J., dissenting). Beyond dispute, Tafero's was a "fiery execution." *Provenzano*, slip op. at 28 (Shaw, J., joined by Anstead, J., dissenting).

Pedro Medina:

Flames accompanied Pedro Medina's execution as well:

> The execution of Pedro Medina on March 25, 1997, was a reprise of the Tafero execution. * * * "A couple of witnesses thought Medina was trying to breathe. Several witnesses did not describe it as attempted breathing, but as a lurching, spasmodic movement, a shudder, and outward not upward movement."

Jones v. State, 701 So.2d 76, 82 (Fla. 1997)(Shaw, J., joined by Kogan, C.J., and Anstead, J., dissenting). In these two executions:

> the condemned prisoner was engulfed in smoke, flames, and the odor of burning material--which some observers described as the stench of burning or roasting flesh--when the switch was pulled. The head of one prisoner (Tafero) was burned and charred, his face was seared by flames, and his eyebrows, eyelashes, and facial hair were burned. The head of another (Medina) was burned and charred and his face was scalded. These deaths were sufficiently egregious to halt further executions and to prompt an extensive official inquiry. They also created a media circus and raucous public spectacle--just like in days of yore.

Jones, 701 So.2d at 87 (Shaw, J., joined by Kogan, C.J., and Anstead, J., dissenting).[4]

Allen Lee Davis

The last use of Florida's electric chair involved "the recent bloody execution of Allen Lee Davis on July 8, 1999." *Provenzano v. Moore*, slip op. at 25 (Shaw, J., joined by Anstead, J., dissenting).

> The execution of Allen Lee Davis on July 8, 1999, differed from prior executions in that here Department of Corrections ("DOC")

---

[4] Florida's electric chair, by its own track record, has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber of Florida State Prison.

Jones, 701 So.2d at 88 (Shaw, J., joined by Kogan, C.J., and Anstead, J., dissenting).

officials took post-execution color photos of Davis before he was removed from the electric chair. (Several of the photos are appended to this dissenting opinion.) These photos, when combined with eye witness accounts, provide a vivid picture of a violent scene. According to witnesses' accounts, when Davis was being strapped into the chair, guards placed a solid leather mouth-strap across his mouth and nose area. This mouth-strap is wide--approximately five inches from top to bottom--and it covered the entire lower portion of Davis's face from the bottom of his chin to immediately below his nose.[5] The strap was fastened so tightly against his face and was so wide that it pushed his nose severely upward, blocking his nostrils at least partially. A heavy fabric face-mask was placed on top of this apparatus, further occluding his airway. And then, as explained below, blood began flowing from his nose prior to electrocution. This too obstructed his nostrils.

The trial court below explained that the pathologist who conducted a post-execution autopsy on Davis concluded that he had been at least partially asphyxiated prior to electrocution:

> Robert Kirschner, M.D., forensic pathologist from Illinois, testified as an expert in the area of forensic pathology. Kirschner testified that he performed an autopsy on the body of Allen Lee Davis. He testified that during Davis's autopsy, he was unable to identify the precise source of the nose bleed that Davis suffered, but that it was coming from the septal area of the left nostril. Kirschner testified that the placement of the mouth strap across Davis' mouth inhibited Davis' breathing and caused him to become at least partially asphyxiated before the application of electrical current to him. Kirschner testified that he is of the opinion that Davis' death was caused by electrocution and association of partial asphyxiation which occurred before the electrocution. . . .

---

[5] The "mouth-strap" in fact appears to be a weight-lifter's belt or some such item. In the photos, the belt is turned backwards, so that the wide portion, which normally would support the back of the weight lifter, is placed over Davis's face. The belt is then run behind two wood rails at the back of the electric chair and buckled behind the chair. [Footnote 35 of slip op.]

. . . .

> Aubrey D. Thornton, Assistant Warden at Florida State Prison, testified that he was one of the individuals responsible for strapping Allen Lee Davis into the electric chair. . . . Thornton also testified that Davis' face began to turn red after the mouth strap was applied to him . . . .

(Emphasis added.) After Davis' airflow had been blocked by the mouth-strap, the face-mask, and his own blood, Davis made several sounds under the face-mask which were described variously as muffled screams, moans, or yells, as if he were attempting to get the guards' attention. The trial court gave the following description:

> John W. Moser, Capital Collateral Regional Counsel for the Middle Region, testified that in his capacity as Capital Collateral Regional Counsel, he witnessed the execution of Allen Lee Davis. Moser testified that between the time Davis was secured in the electric-chair and the time the electrical current was applied to Davis, he heard what sounded like two screams from Davis. . . .
>
> Mark Lazarus, Victim Assistance Administrator for the Florida Department of Corrections, testified that he observed the execution of Allen Lee Davis. Lazarus testified that after the head piece was placed on Davis' head, he heard two one-syllable sounds coming from Davis and that the sounds sounded like Davis was trying to "make some noise" or "yell out." . . .
>
> . . . .
>
> Thomas Varnes, Warden at Wakulla Correctional Institution, testified that he witnessed the execution of Allen Lee Davis. Varnes testified that after the mouth strap and chin strap of the head piece were tightened and the face mask was lowered, he heard Davis moan like he was trying to say something. . . .
>
> . . . .
>
> James Crosby, Warden of Florida State Prison testified that after the mouth piece was placed on Davis, and just before the execution, he heard

> two muffled sounds from Davis, which sounded like Davis was trying to say something.

(Emphasis added.)

Prior to and during the electrocution, blood flowed freely from Davis' nose, ran over the mouth-strap, and spilled onto his chest, forming a pool the size of a dinner plate on his white shirt. Again, in the words of the trial court below:

> Sheila McAllister, Correctional Probation Officer at Wakulla Correctional Institution, testified that she witnessed the execution of Allen Lee Davis. . . . McAllister also testified that while the current was on she observed blood on Davis' chest, and she observed something dripping from behind Davis' mask.
>
> . . . .
>
> Michael R. Collins, employed with Florida State Prison as a nurse, testified that he attended the execution of Allen Lee Davis. . . . Collins further testified that after the electrical current was stopped and after Mr. Matthews, the Florida State Prison physician's assistant, was examining Davis, he observed blood on Davis' shirt in his chest area and on his upper right side, by his collar. Collins stated that the blood was dripping from under the mask . . . .
>
> . . . .
>
> William Muse, Lieutenant with the Florida Department of Corrections, assigned to Florida State Prison, testified that he witnessed the execution of Allen Lee Davis. . . . Muse testified that after the cycle of current had been terminated, he observed blood on Davis' shirt, blood on the strap, and blood coming from Davis' nostril(s).

(Emphasis added.) In light of the placement of the mouth-strap, the positioning of the face-mask, and the flow of blood from his nostrils, it is reasonable to conclude--as did Dr. Kirschner--that Davis was being smothered before he was electrocuted.

And finally, as with Tafero and Medina, Davis' body was mutilated by burns on the head, face, and leg, as noted in the trial court's order:

> The deposition of William Hamilton, M.D., Medical Examiner for the Eighth Judicial Circuit, was read into the record due to Hamilton's unavailability. . . . Hamilton testified that Davis had burns on his scalp and forehead, on his superpubic and right upper medial thigh region, and behind the right knee.

(Emphasis added.)

The color photos taken by DOC show a ghastly post-execution scene: Davis is wearing a white shirt and dark pants and is restrained in the wooden chair by thick leather straps placed across his arms, legs, torso, and mouth; the electrical head-piece is attached to the top of his head with a leather strap that runs under his chin; a sponge placed under the head-piece obscures the entire top portion of his head down to his eyebrows; because of the width of the mouth-strap, only a small portion of Davis' face is visible above the mouth-strap and below the sponge, and that portion is bright purple and scrunched tightly upwards; his eyes are clenched shut and his nose is pushed so severely upward that it is barely visible above the mouth-strap; although the exterior openings of Davis' nostrils are partially visible, it appears as though the interior openings may be covered by the mouth-strap; a stream of blood pours from his nostrils, flows over the wide leather mouth-strap, runs down his neck and chest, and forms a bright red pool (approximately eight by twelve inches) on his white shirt. The scene is unquestionably violent.

Provenzano v. Moore, slip op. at 48-53 (Shaw, J., joined by Anstead, J., dissenting).

In sum, then:

> In two of these botched executions (Tafero and Medina), the prisoner was engulfed in smoke and flames when the switch was pulled. The head of one prisoner (Tafero) was burned and charred, his face was licked by flames, and his eyebrows, eyelashes, and facial hair were burned; his head also was gouged and made raw with wounds. The head of another (Medina) was burned and charred and his face was scalded. In the third botched execution

> (Davis), the prisoner suffered blood flowing from his nose and pooling on his chest; he was likely asphyxiated at least partially prior to electrocution, and he attempted to scream or yell after his airway was occluded; he too was burned on his head, face, and leg.

Provenzano v. Moore, slip op. at 54-55 (Shaw, J., joined by Anstead, J., dissenting).

REASONS FOR GRANTING THE WRIT

1. This Court has not considered the federal constitutionality of any means of execution since well before the inception of the modern era of Eighth Amendment adjudication.

In re Kemmler, 136 U.S. 436, 447 (1890), and *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947), both predate **all three** of the major doctrinal developments that frame today's relevant constitutional law: (a.) the Court's incorporation of the Eighth Amendment into the Fourteenth in *Robinson v. California*, 370 U.S. 660 (1962); (b.) the recognition in *Trop v. Dulles*, 356 U.S. 86 (1958), that the Eighth Amendment is progressive and reflects "evolving standards of decency"; and (c.) the recognition in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), that the Eighth Amendment is concerned with whether a particular American jurisdiction's procedures for administering the death penalty create a constitutionally unacceptable amount of risk that the penalty will be imposed in violation of prevailing norms of decency, *e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)(plurality opinion); *Beck v. Alabama*, 447 U.S. 625, 637 (1980).

2. The importance of the Court's considering what restrictions are imposed by the Eighth Amendment on a State's choice of means of execution has intensified in recent years as a result of: (a.) the development of lethal injection as an available alternative

means; (b.) the insistence of some States upon retaining earlier means, such as the electric chair; and (c.) the rising numbers of executions throughout the country – 76 so far in 1999, the highest in a single year since 1954. Under these circumstances, the lower state and federal courts will have to deal with increasing numbers of means-of-execution cases; and thus far they have had no guidance from this Court except the remote and outdated guidance provided by *Kemmler* and *Francis*. *See Jones*, 701 So.2d at 83 ("The United States Supreme Court has not reviewed a method of execution under the federal constitution in over a hundred years and the lower federal courts are not in accord in this area, offering scant guidance to the states.") (Shaw, J., joined by Kogan, C.J., and Anstead, J., dissenting)(footnote omitted).

3. **The present case presents an extraordinarily good vehicle for the Court to address the issues** because:

(a.) The case raises a set of broader and narrower questions (ranging from the question whether contemporary developments have made the maintenance of electrocution as the sole, mandatory means of execution unconstitutional *per se*, to the question whether Florida's particular procedures for conducting an electrocution involve an undue risk or generate undue apprehension of torturous death) that will allow the Court to take the full measure of the issues involved and to develop a properly tuned doctrinal response to them.

(b.) The record is well developed factually and provides the necessary information to inform the Court about the characteristics of electrocution generally, Florida's specific electrocution procedures, and the history of actual performance of Florida's electric chair.

(c.) The Florida history is a shocking abomination that calls for correction; Florida's execution procedures escaped invalidation by the Florida Supreme Court only by the

narrowest of votes; and even the Justices of the Florida Supreme Court who voted to uphold the procedures were moved to call upon the Legislature to authorize alternative means of execution more in keeping with contemporary standards and experience.

(d.) The central issues which this case presents in the context of the Florida history are squarely at the intersection of the original understanding of the Cruel and Unusual Punishment Clause and this Court's contemporary Cruel-and-Unusual-Punishment jurisprudence. Unlike the Willie Francis case, this is not a case about a single botched execution, however badly botched. *It is a case about a State's persistence in maintaining a general procedure for conducting executions after experience has shown that the procedure is fraught with an intolerable, uncontrollable risk of torturous results and will therefore also inflict upon each condemned inmate who undergoes it a torment of inescapable terror.* The Court's cases, such as *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Lewis v. Jeffers*, 497 U.S. 764 (1990), make clear that Eighth Amendment adjudication cannot proceed primarily by correcting ugly but isolated instances of deviation from generally acceptable standards of procedure; rather, it must be concerned with assuring that general procedures themselves are adequately designed and maintained to avoid undue and unnecessary risks of inflicting forbidden punishments. Florida's disregard of this concern where the risk in question is that of physical and mental torture should not go unreviewed by the Court under Eighth Amendment principles as these have evolved over the past half-century.

(e.) The opinions from the lower court reveal the constitutional turmoil that exists. The Florida Supreme Court "wait[s] in dread anticipation of some 'unforeseeable accident'" whenever an execution is scheduled in Florida. *Provenzano v. Moore*, No. 95,973, slip

op. at 10 (Harding, C.J., joined by Lewis, J., specially concurring). The Florida Supreme Court has addressed challenges to the manner in which the Florida electric chair was used in the executions of Jesse Tafero,[6] Pedro Medina,[7] and Allen Lee Davis,[8] and, with increasing frustration and uncertainty, the court has narrowly sustained the use of the chair. But not without pause – *"[t]he answer to this question is not easy . . . ."* *Provenzano v. Moore*, slip op. at 17 (Quince, J., joined by Wells, J., concurring)(emphasis added).

Mr. Bryan is scheduled to be executed in Florida's "accident"-prone electric chair, with the Florida Department of Corrections's staff apparently intent upon using the same implements in the same manner which terrorized Allen Lee Davis, on Wednesday, October 27, 1999. The State can use this electric chair notwithstanding the fiery deaths of Jesse Tafero and Pedro Medina, and the recent bloody execution of Allen Lee Davis, because in *Provenzano* a 4-3 majority of the Florida Supreme Court--by a most restrictive and flawed view of what the Eighth Amendment requires--allowed its use.

The majority opinion in Provenzano is flawed for several reasons. First, rather than conducting a thorough, *de novo*, analysis of the evidence in the record to determine whether that evidence revealed an Eighth Amendment violation, the majority simply applied a Florida rule (to resolve an Eighth Amendment issue) that the lower court judgment would be affirmed if there was substantial, competent, evidence to support it. Thus, "despite considerable evidence to the contrary," *Provenzano v. Moore*, slip op. at 25-26 (Shaw, J., joined by Anstead, J., dissenting),

---

[6]*Buenoano v. State*, 565 So.2d 309 (Fla. 1990).

[7]*Jones v. State*, 701 So.2d 76 (Fla. 1997).

[8]*Provenzano v. Moore*, No. 95,973 (Fla. 1999).

the majority adopted the trial court's conclusion that Allen Lee Davis suffered no pain associated with the application of electricity. The court utterly failed to consider the conscious pain and suffering inflicted upon Mr. Davis by the execution implements, installed by indifferent DOC staff. Second, the "suffered no pain" conclusion was the sum total of the majority's analysis–the majority "did not address violence or mutilation or the per se constitutionality of electrocution as a mode of execution in Florida," *Provenzano v. Moore*, slip op. at 24 (Shaw, J., joined by Anstead, J., dissenting), yet "'[c]ivilized standards, for example, require a minimization of physical violence during execution *irrespective* of the pain that such violence might inflict on the condemned.'" *Jones*, 701 So.2d at 84 (Shaw, J., joined by Kogan, C.J., and Anstead, J., dissenting)(emphasis added), *quoting Glass v. Louisiana*, 471 U.S. 1080, 1085 (1985)(Brennan, J., dissenting).[9] Third, through a combination of the aforementioned two errors, the majority did not address the question of *risk* – the record revealed "a substantial *risk* of malfunction (including external burning, bleeding, asphyxiation, etc."), *Provenzano v. Moore*, slip op. at 72 (Anstead, J., joined by Shaw, J., dissenting), notwithstanding the conclusions reached by the trial judge. *See also Jones*, 701 So.2d at 89 (Anstead, J., joined by Kogan, C.J., and Shaw, J., dissenting)("[T]here is a significant risk of the infliction of unnecessary pain, both mental and physical, in the electrocution process and culture in Florida.").

The *dissenters* addressed the issues of risk, torture, pain and mutilation, violence, and the

---

[9]"The court focused only on the question before it and did not address the issues of violence or mutilation or the overall record of electrocution as a method of execution in Florida."
Provenzano v. Moore, slip op. at 25-26 (Shaw, J., joined by Anstead, J., dissenting).

evolving standards of decency in a civilized society. Under this correct constitutional analysis, the dissenters concluded as follows:

> Recent executions have revealed one problem after another.[10] Flames spewed from the heads of Medina and Tafero. *See Jones*, 702 So. 2d at 85-86. The cause was found to be an improper sponge. *See id.* at 86. After two flaming executions, the sponges were replaced and the flames ceased. However, it is undisputed that despite all of the best efforts, electrocution will result in burning of parts of the body. In fact, all of the inmates in the last executions have sustained outward burns to their bodies. Thus, burning is inherent in the method of the execution.

Provenzano v. Moore, slip op. at 82-83 (Pariente, J., joined by Shaw and Anstead, JJ., dissenting).

> The administration of electrocution in Florida demonstrates the cruelty inherent in this method of execution. Not only was every execution in Florida accompanied by the inevitable convulsing and burning that characterizes electrocution, but further, three executions in particular were marred by extraordinary violence and mutilation. In two of these executions, smoke and flames spurted from the headpiece and burned the heads and faces of the inmates. In the third execution, the inmate bled from the nostrils and was at least partially asphyxiated by the restraining devices; and he too was burned.

Provenzano v. Moore, slip op. at 44 (Shaw, J., joined by Anstead, J., dissenting)(footnote omitted).

---

[10] I agree that the Department of Corrections (DOC) appears to be attempting in good faith to correct recurrent problems that have turned a series of executions over the last few years into something of a freak show. In fact, it is precisely because these problems continue to occur, despite the best efforts of DOC, that the electric chair is not only unconstitutional as applied in Florida, but per se unconstitutional as a cruel and unusual punishment incompatible with evolving standards of decency. [Footnote 60 in slip op.].

Following the Tafero execution, the federal district court in Florida addressed the issue of repeated mishaps:

> If a pattern of malfunctions develops, perhaps even as few as two consecutive or nearly consecutive executions, then it may become appropriate to consider whether the application of electrocution in Florida is infected with "an element of cruelty."

Hamblen v. Dugger, 748 F. Supp. 1498, 1504 (M.D. Fla. 1990). The Tafero, Medina, and Davis executions have now established a pattern of impermissible violence and mutilation.[11]

> It is clear on the record before this Court that execution by electrocution as carried out in Florida is not limited to "the mere extinguishment of life" as required under *Kemmler*, for this method of execution entails undue violence and mutilation. This is particularly clear in light of the continuing--and apparently unavoidable--mishaps involving Florida's electric chair. The punishment that is actually meted out by DOC officials differs in kind from the simple sentence of death that the constitution permits and that was recommended by the penalty phase juries and ordered by the courts. Execution by electrocution as administered by DOC in Florida violates *Kemmler*.

Provenzano v. Moore, slip op. at 55-56 (Shaw, J., joined by Anstead, J., dissenting).

> Execution by electrocution--with its attendant smoke and flames and blood and screams--is a spectacle whose time has passed. The fiery deaths of Jesse Tafero and Pedro Medina and the recent bloody execution of Allen Lee Davis are acts more befitting a

---

11 *See also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring) ("The fact that I reach this conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions."); *Squires v. Dugger*, 794 F. Supp. 1568, 1580 (M.D. Fla. 1992) ("Absent a showing establishing a pattern of malfunctions in the operation of the electric chair, the Court cannot conclude that unnecessary pain is being inflicted during executions in the Florida electric chair."). [Footnote 37 in slip op.].

> violent murderer than a civilized state. The color photos of Davis depict a man who--for all appearances--was brutally tortured to death by the citizens of Florida. Violence begets violence, and each of these deaths was a barbaric spectacle played by the State of Florida on the world stage. Each botched execution cast the entire criminal justice system of this state--including the courts--in ignominy.

Provenzano v. Moore, slip op. at 66-67 (Shaw, J., joined by Anstead, J., dissenting).

> Because we know that lethal injection provides a more humane alternative, and, because we now know from actual experience that electrocution always involves mutilation (within and without the body) and a substantial risk of malfunction (including external burning, bleeding, asphyxiation, etc.), as well as a culture of cruelty ("burn 'em", "fry 'em"), it is apparent that electrocution has become a cruel and senseless punishment, especially when evaluated in light of our evolving standards of decency.

Provenzano v. Moore, slip op. at 72 (Anstead, J., joined by Shaw, J., dissenting)

> We know, as the State has candidly conceded, that the entire process of death by electrocution is at least "somewhat ghastly." We also know, as aptly explained by Chief Justice Harding, that a more humane means of taking life is readily available to the State. Under those circumstances, our continuing embrace of a savage and inhumane means of taking life does a disservice to our justice system and our society.

Provenzano v. Moore, slip op. at 73 (Anstead, J., joined by Shaw, J., dissenting)(footnote omitted).

These dissenting opinions reflect this Court's Eighth Amendment concerns more faithfully than does the majority opinion. Punishments violate the Eighth Amendment when they involve subjecting inmates to the unnecessary and wanton infliction of pain, *Helling v. McKinney*, 509 U.S. 25 (1992), lingering death, *In re Kemmler*, 136 U.S. 436, 447 (1890), ***or*** "something inhuman and barbarous--something more than the mere extinguishment of life," *id.*, such as the denial of basic human "dignity, civilized standards, humanity, and decency," *Estelle v. Gamble*,

429 U.S. 97, 102 (1976)(internal quotation marks and citation omitted), as through degradation and mutilation, *see Weems v. United States*, 217 U.S. 349 (1910); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878), which are "repugnant to the conscience of mankind." *Estelle*, 429 U.S. at 105, quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947)(Frankfurter, J., concurring), *in turn quoting*, *Palko v. Connecticut*, 302 U.S. 319, 323 (1937), and thus violate "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86 (1958). Punishments are also cruel when they entail exposure to risks that "serves no 'legitimate penological objective,'" *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), *quoting Hudson v. Palmer*, 468 U.S. 517, 548 (1984), and that are "simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" *Farmer*, 511 U.S. at 834, *quoting Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). *See also Gregg v. Georgia*, 428 U.S.-153, 182-183 (1976)(punishment must "comport with the basic concept of human dignity" and have some "penological justification").

Florida's use of judicial electrocution poses an "objectively intolerable risk of harm [to Mr. Bryan]." *Farmer*, 511 U.S. at 846. *See Provenzano*, Slip op. at 23 (Wells, J., concurring)("human error . . . seems to plague this form of execution"); *id.* at 53 (Shaw, J., dissenting)(noting that "in three out of twenty-three executions, i.e., in thirteen percent of executions, the prisoner was subjected to extreme violence and mutilation when the execution was botched"); *id.* at (Pariente, J., dissenting)("expert testimony submitted by Provenzano and the witnesses accounts of survival after electrocution raise serious questions that judicial electrocution does in fact involve conscious pain and suffering"). Exposing Mr. Bryan to such risks, where the harms he would suffer are those from which contemporary society's standards of decency

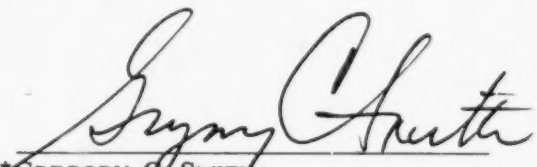
demand protection, violates the Eighth Amendment. *Helling*, 509 U.S. at 36, *Farmer*, *supra*; *Estelle*, 429 U.S. at 103.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari on each of Bryan's questions presented.

Respectfully submitted,

GREGORY C. SMITH
Capital Collateral Counsel
Northern Region



*GREGORY C. SMITH
Fla. Bar No. 0279080
Capital Collateral Counsel
Northern Region

ANDREW THOMAS
Fla. Bar No. 0317942
Chief Assistant CCC-NR

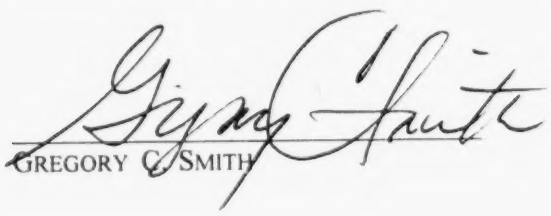
Capital Collateral Counsel
Northern Region
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(850) 488-7200

Attorneys for Anthony Braden Bryan
*Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari is being sent via facsimile transmission, copy to follow by United States mail, first class postage prepaid, to Richard Martell, Chief, Capital Appeals, Department of Legal Affairs, Leroy Collins Building, 107 West Gaines Street, Tallahassee, FL 32301, this 21st day of October, 1999.

GREGORY C. SMITH
Capital Collateral Counsel
Northern Region
Capital Counsel of Record for Mr. Bryan



GREGORY C. SMITH

PUBLISHER'S NOTE:

THE FOLLOWING PAGE WAS UNAVAILABLE FOR FILMING:

1

article V, sections 3(b)(1) and (9) of the Florida Constitution. For the reasons explained below, we affirm the circuit court's order.

During the evidentiary hearing on this matter, both parties presented several witnesses, including testimony from experts. Most of the testimony focused on alleged errors committed by the Department of Corrections (DOC) during recent executions, particularly the execution of Allen Lee Davis on July 8, 1999. At the conclusion of the hearing, the circuit court entered an order denying relief, wherein it made the following findings of fact:

> (1) During the execution of Allen Lee Davis, the electric chair functioned as it was intended to function. Although the breakers and other components of the electrical circuitry are old, the electric circuitry is adequate to assure the proper functioning of the electric chair.
>
> (2) The cycles of voltage and amperage applied in the execution of Allen Lee Davis did not deviate from the execution protocol which was previously approved by the Florida Supreme Court. The execution protocol merely states: "The automatic cycle begins with the programmed 2,300 volts, 9.5 amps, for 8 seconds . . . ." (emphasis added). The protocol does not state the voltage and amperage levels set forth therein are the precise voltage and amperage levels that must be administered to the inmate who is being executed.
>
> The execution protocol does not take into account the varying levels of resistance created by each and every inmate. The resistance created by each executed inmate's body, or ohms, can be determined by dividing the number of volts administered by the number of amps administered. Since the level of resistance varies from inmate to inmate, these figures must necessarily vary. The variations in these figures do not violate the execution protocol.
>
> (3) The death of Allen Lee Davis did not result from

asphyxiation caused by the mouth strap.

(4) Allen Lee Davis did not suffer any conscious pain while being electrocuted in Florida's electric chair. Rather, he suffered instantaneous and painless death once the current was applied to him.

(5) The nose bleed incurred by Allen Lee Davis began before the electrical current was applied to him, and was not caused whatsoever by the application of electrical current to Davis. This Court is unable to make a finding regarding the exact cause or situs of the initial onset of the nose bleed because that information was not determined during either of the autopsies performed on Davis' body.

(6) The post-execution photographs of Allen Lee Davis indicate that the straps used to restrain Davis' body, specifically, the mouth strap and chin strap, may have caused Davis to suffer some discomfort. However, the straps did not cause him to suffer unnecessary and wanton pain, and the mouth strap was not a part of the electrical operation of the electric chair.

(7) The use of a mouth strap to secure an inmate's head to the electric chair may be desirable, however a smaller and/or redesigned mouth strap could accomplish the same purpose without raising the same issue involved here.

(8) Execution inherently involves fear, and it may involve some degree of pain. That pain may include pain associated with affixing straps around the head and body to secure the head and body [to] the electric chair. However, any pain associated therewith is necessary to ensure that the integrity of the execution process is maintained.

The circuit court also made the following conclusion of law:

> Execution by electrocution in Florida's electric chair as it exists in its present condition as applied does not constitute cruel or unusual punishment, and therefore, is not unconstitutional.

Provenzano raises four arguments regarding the circuit court's order. First, Provenzano asserts that the circuit court erred in concluding that the electric chair

did not constitute cruel or unusual punishment. Provenzano alleges three different bases for this conclusion: (1) the electric chair causes pain, both in preparing for and during the electrocution, (2) the electrical circuitry has not been maintained, and (3) DOC has failed to follow protocol.

This Court recently concluded in Jones v. State, 701 So. 2d 76, 79 (Fla. 1997), that "[i]n order for a punishment to constitute cruel or unusual punishment, it must involve 'torture or a lingering death' or the infliction of 'unnecessary and wanton pain.'" (citing Gregg v. Georgia, 428 U.S. 153 (1976), and Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947)). The record in this case reveals abundant evidence that execution by electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain. The record also contains evidence that the electric chair is and has been functioning properly and that the electrical circuitry is being maintained.

In Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (quoting Jones v. State, 591 So. 2d 911, 916 (Fla. 1991)), this Court stated, "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" We find that the circuit court's findings of fact are supported

by competent, substantial evidence. Therefore, we again conclude, as we did in Jones, that Florida's electric chair is not cruel or unusual punishment.

We are aware that the record contains numerous references from witnesses, including State witnesses, that the execution protocol is not well written. There is also a recommendation from the circuit court for DOC to employ "a smaller and/or redesigned mouth strap." We conclude that there is competent, substantial evidence to support the circuit court's finding of fact that the execution protocol was not violated in the Davis execution. However, it may be appropriate for DOC to revisit the protocol, including the use of the mouth strap, to ensure that it is consistent with the functioning of the electric chair.

In issue two, Provenzano claims that Florida's current use of electrocution as its sole method of execution is unconstitutional because it violates the evolving standards of decency that mark the progress of a maturing society. This claim was rejected by this Court in Jones. See 701 So. 2d at 79.

In issue three, Provenzano claims that the circuit court made numerous erroneous evidentiary rulings during the evidentiary hearing,[1] thereby denying him

---

[1] Provenzano claims that the circuit court erred in ruling that the testimony of two potential witnesses (Thomas Crapps and Richard Martell) was precluded. Provenzano also claims that the circuit court erred in sustaining the State's objections to questions concerning certain testimony from witnesses Rabbani Muhammed and A.D. Thornton.

a full and fair hearing. In Heath v. State, 648 So. 2d 660, 664 (Fla. 1994), this Court stated that "[t]he trial court has broad discretion in determining the relevance of evidence and such determination will not be disturbed absent an abuse of discretion." Provenzano has not demonstrated that the circuit court abused its discretion on these evidentiary rulings.

In issue four, Provenzano claims that the circuit court erred when it struck additional petitioners from Provenzano's petition for relief in this case. We find no merit to this issue. The order in this case directing the circuit court to hold an evidentiary hearing was specific as to the parties in this case. Further, a similar motion to intervene was denied by this Court in Jones v. State, No. 90,231 (order filed July 3, 1997).

Accordingly, for the reasons expressed in this opinion, we affirm the circuit court's order finding that the electric chair is not unconstitutional. No motion for rehearing will be permitted.

It is so ordered.

HARDING, C.J., and WELLS, LEWIS, and QUINCE, JJ., concur.
HARDING, C.J., concurs specially with an opinion, in which LEWIS, J., concurs.
WELLS, J., concurs with an opinion, in which QUINCE, J., concurs.
QUINCE, J., concurs specially with an opinion, in which WELLS, J., concurs.
SHAW, J., dissents with an opinion, in which ANSTEAD, J., concurs.
ANSTEAD, J., dissents with an opinion, in which SHAW, J., concurs.
PARIENTE, J., dissents with an opinion, in which ANSTEAD, J., concurs.

HARDING, C.J., specially concurring.

I write separately for two reasons. First, I write to explain the reasons that I concur with the majority opinion regarding the constitutionality of the electric chair. Second, I again urge the Legislature to offer lethal injection as an alternative method of execution.

I. Constitutionality of the Electric Chair

I agree with the majority in upholding the circuit court's findings regarding electrocution as a constitutional method of execution. While I am disturbed by the graphic photographs of Allen Lee Davis' body following his July 8, 1999, execution, I do not find this alone enough to deem electrocution "cruel or unusual" punishment. "Since it is the method of execution that is challenged, it follows that a court must focus on the procedure as a whole and over time, rather than on any one particular execution." Fierro v. Gomez, 865 F. Supp. 1387, 1411 n.25 (N.D. Cal. 1994) (permanently enjoining California from executing inmates by lethal gas), aff'd, 77 F.3d 301 (9th Cir.) (affirming injunction based on district court's factual findings regarding pain), vacated, 519 U.S. 918 (1996) (vacating judgment and remanding for further consideration in light of California's subsequently amended death penalty statute providing that lethal injections should be used to

carry out death sentences unless the defendant requests that the State use the gas chamber). As explained by the district court in Fierro, the key question to be answered in a challenge to the method of execution is how much pain the inmate suffers. Id. at 1411. Where "unconsciousness is 'likely to be immediate or within a matter of seconds'" the method is within constitutional limits. Id. (quoting Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994) (finding that Washington's execution by judicial hanging did not violate prohibition against cruel and unusual punishment)). The record in the instant case contains competent, substantial evidence to support the conclusion that Davis was rendered unconscious instantaneously when the current was applied. This Court may not arbitrarily overturn the circuit court's finding based upon conflicting evidence in the record. See Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976) ("It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test, as pointed out in Westerman [v. Shell's City, Inc., 265 So. 2d 43 (Fla. 1972),] is whether the judgment of the trial court is supported by competent evidence.").

II. Lethal injection: The Need for Legislative Action

However, as I suggested in my concurring opinion in Jones v. State, 701 So.

2d 76, 80 (Fla. 1997) (Harding, J., specially concurring), I urge the Legislature to revisit this issue and pass legislation giving death row inmates the choice between lethal injection and electrocution as the method of carrying out the death penalty. See Art. I, § 17, Fla. Const. ("Methods of execution may be designated by the Legislature."); see generally, e.g., Ariz. Rev. Stat. Ann. § 13-704(b) (West Supp. 1998) (defendant sentenced to death for offense committed prior to date of amended statute shall choose either lethal injection or lethal gas; execution by lethal injection if the defendant fails to choose method); Cal. Penal Code § 3604(b) (West Supp. 1999) (same); S.C. Code Ann. § 24-3-530(A) (Law Co-op. Supp. 1998) (election between electrocution and lethal injection; if defendant waives right of election, then penalty must be administered by lethal injection); Utah Code Ann. § 77-18-5.5 (1995) (election between firing squad and lethal injection; where no preference is stated, execution is by lethal injection); Va. Code Ann. § 53.1-234 (Michie 1998) (election between electrocution and lethal injection; lethal injection where prisoner fails to choose in timely manner); Wash. Rev. Code § 10.95.180(1) (1998) (death shall be inflicted by lethal injection unless defendant elects hanging).

Florida death row inmates almost routinely challenge electrocution as a cruel or unusual method of punishment. See, e.g., Davis v. State, 24 Fla. L.

Weekly S345 (Fla. July 1, 1999), cert. denied, 68 U.S.L.W. 3136 (U.S. July 7, 1999), and cert. denied, 68 U.S.L.W. 3136 (U.S. July 7, 1999); Remeta v. State, 710 So.2d 543, 546 (Fla.), cert. denied, 118 S. Ct. 1383 (1998); Jones v. State, 701 So. 2d 76, 80 (Fla. 1997), cert. denied, 118 S. Ct. 1297 (1998); Stano v. Singletary, 692 So.2d 180, 181 (Fla. 1997). Such challenges consume an inordinate amount of the time and resources expended by inmates' counsel, State counsel, and judicial personnel. Furthermore, each time an execution is carried out, the courts wait in dread anticipation of some "unforeseeable accident" that will set in motion a frenzy of inmate petitions and other filings. See Jones, 701 So.2d at 76 n.1, 77 (discussing Pedro Medina's 1997 execution, where flames were seen near the headpiece of the electric chair and smoke emanated from under the headpiece; circuit court found that flame and smoke were caused by insufficient saline solution on the sponge in the headpiece of the electric chair); Buenoano v. State, 565 So.2d 309, 310-11 (Fla. 1990) (discussing flames and smoke that erupted from the headpiece of the electric chair during the 1990 execution of Jessie Tafero; investigation concluded that the irregularities in Tafero's execution were caused by the use of a synthetic sponge).

It is my view that the Legislature can foreclose many of these claims by simply amending Florida's death penalty statute to provide that death sentences

should be carried out by lethal injection unless the defendant requests execution by electrocution. See Fierro v. Terhune, 147 F.3d 1158, 1160 (9th Cir. 1998) (finding that California inmates lacked standing to challenge constitutionality of execution by lethal gas and claims were not ripe for decision where the inmates had not chosen execution by lethal gas); Poland v. Stewart, 117 F.3d 1094, 1104 (9th Cir. 1997) (finding that similar challenge to identical Arizona statute was not ripe because inmate had not chosen lethal gas as method of execution). While an inmate's choice of electrocution would not constitute a waiver of his or her Eighth Amendment protections and would not foreclose a constitutional challenge to this method of execution, see LaGrand v. Stewart, 173 F.3d 1144 (9th Cir. 1999), the alternative method of lethal injection would still be available even if a constitutional challenge of electrocution proved successful. See id. at 1149 (ordering that no inmates be executed by lethal gas and that inmate bringing challenge could not be executed pursuant to the existing death warrant which required execution by lethal gas, but also recognizing that warrant could be "reissued in a form that does not require execution by lethal gas").

Although not determinative of the Eighth Amendment claim, I find it significant that a number of other states that once relied on electrocution as the sole means of execution have now either entirely abandoned this method or

BEST AVAILABLE COPY

offered an alternative. Nineteen of the states that currently permit capital punishment specified in 1970 that electrocution was the exclusive form of capital punishment. See Fierro, 865 F. Supp. at 1406. Today, of the thirty-eight states that permit capital punishment for the crime of first-degree murder, only four states rely on electrocution as the exclusive form of punishment. See Fla. Correct. Comm'n, 1997 Supplemental Report on Execution Methods Used by States at 48 (June 20, 1997) (on file with Library, Fla. Sup. Ct.) [hereinafter Commission Report]; Ky. Rev. Stat. Ann. § 431.220 (Michie Supp. 1998) (establishing lethal injection as the sole means of capital punishment for defendants receiving death sentence on or after March 31, 1998, and giving the choice of electrocution or lethal injection to those prisoners sentenced prior to March 31, 1998); Tenn. Code Ann. § 40-23-114 (Supp. 1998) (establishing lethal injection as the sole means of capital punishment for defendants receiving death sentence on or after January 1, 1999, and giving the choice of electrocution or lethal injection to those prisoners sentenced prior to January 1, 1999). In contrast, thirty-four states offer lethal injection either as a choice or as the exclusive form of punishment. See Commission Report at 48; Ky. Rev. Stat. Ann. § 431.220; Tenn. Code Ann. § 40-23-114. Clearly, the modern trend is towards rejecting electrocution as a method of capital punishment. In fact, in the 1997 report submitted to the Governor and

the Legislature by the Florida Corrections Commission, the Commission recommended that Florida permit lethal injection as an alternative method of execution. See Commission Report at 28.

Finally, it is important to note that several courts, including the United States Supreme Court, have held that it is not an ex post facto violation to apply a change in execution methods retroactively. See Malloy v. South Carolina, 237 U.S. 180, 185 (1915); Hernandez v. State, 32 P.2d 18, 25 (Ariz. 1934) (upholding amendment to statute which changed method of capital punishment from hanging to lethal gas); DeShields v. State, 534 A.2d 630, 639 n.7 (Del. 1987) ("A statute which provides an optional method of death is not ex post facto legislation or an unlawful bill of attainder."); State ex rel. Pierre v. Jones, 9 So. 2d 42, 46 (La. 1942) (upholding amendment to statute which changed method of capital punishment from hanging to electrocution); State v. Fitzpatrick, 684 P.2d 1112, 1113 (Mont. 1984) (upholding amendment to statute which allowed defendant to elect either lethal injection or hanging as the method of punishment); Woo Dak San v. State, 7 P.2d 940, 941 (N.M. 1931) (upholding amendment to statute which changed method of capital punishment from hanging to electrocution); Ex parte Granviel, 561 S.W. 2d 503, 510-11 (Tex. Crim. App. 1978) (upholding amendment to statute which changed method of capital punishment from

electrocution to lethal injection); In re Personal Restraint of Benn, 952 P.2d 116. 149 n.19 (Wash. 1998) ("Retroactive application of a change in the method of execution does not violate the Ex Post Facto Clause where the change is to a more humane method."). In Malloy, the Supreme Court concluded that "[t]he statute under consideration did not change the penalty–death–for murder, but only the mode of producing this . . . . The punishment was not increased . . . ." 237 U.S. at 185. In Weaver v. Graham, 450 U.S. 24, 33 n.17 (1981), the United States Supreme Court further explained its decision in Malloy, wherein the Court stated, "In Malloy v. South Carolina, we concluded that a change in the method of execution was not ex post facto because evidence showed the new method to be more humane, not because the change in the execution method was not retrospective." (Citation omitted.) My research has not revealed a single state that has found the retroactive application of a more humane method of execution to be unconstitutional. This is true even though the sentence imposed specifically called for the previous method of execution.

For all of the reasons expressed, I believe that the Legislature will only improve death penalty jurisprudence in Florida by amending our state's statute to permit inmates to choose between lethal injection and electrocution. This is the prudent and proper step for the Legislature to take.

LEWIS, J., concurs.

WELLS, J., concurring.

I concur in the majority opinion and the separate concurring opinion of Justice Quince. I write briefly to make two points.

First, the Davis nosebleed has not provided any basis for this Court to reexamine this issue. This Court, on July 8, 1999, sent this case to a trial judge because of allegations that the electric chair did not function as intended in the Davis execution. The trial judge made the factual determination that those allegations were unfounded. Therefore, there is no basis to disturb the decision that this Court so recently made in Jones.

Second, in respect to Chief Justice Harding's recommendation as to lethal injection, obviously the legislature can relieve further complications involved with the electric chair issues by changing the method of execution to lethal injection for those crimes committed after the effective date of the legislation. I join in the recommendation to that extent.

However, I have to acknowledge that there are legal issues with the changing of sentencing laws for the punishment of crimes committed prior to a change in the law. This Court has been repeatedly taught that lesson by the United

States Supreme Court. In Gomez v. Singletary, 733 So. 2d 499 (Fla. 1998), the majority made this point, pointing to Weaver v. Graham, 450 U.S. 24 (1981), Lynce v. Mathis, 519 U.S. 433 (1997), Calamia v. Singletary, 117 S. Ct. 1309 (1997), and State v. Lancaster, 118 S. Ct. 37 (1997). A great number of prisoners presently on death row have been sentenced to death by judgments which specify use of the electric chair because their sentences conformed with the existing law. All have been sentenced on the basis of section 922.10, Florida Statutes, which states: "A death sentence shall be executed by electrocution."

Not only does this United States Supreme Court precedent present legal issues on a change of this Florida statute, the Florida Constitution presents a legal issue in article X, section 9, which states expressly: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." (Emphasis added.) Justice Shaw's dissent acknowledges this legal issue in its footnote 53, recognizing this Court's precedent in Washington v. Dowling, 92 Fla. 601, 109 So. 588 (1926), from which he states he would recede.

A change to lethal injection for inmates may be legally attainable based upon an express waiver by the prisoner of any contest as to the method of execution. However, such a change requires full study and awareness by the

legislature of the legal issues. Consequently, I do not join those that recommend it without acknowledging the consequent legal issues and that those legal issues will present matters for further litigation. I conclude that because of these outstanding legal issues the decisions as to this change are within the province of the legislature and are matters about which this Court cannot properly render an advisory opinion regardless of our personal views as to that decision.

QUINCE, J., concurs.

QUINCE, J., specially concurring.

I agree with the majority's determination that death by electrocution is not cruel and unusual punishment within the meaning of the Eighth Amendment. While there has been much said about the Davis execution because of the blood which dripped from the inmate's nostril during this process, the real question presented here is whether or not the use of electrocution violates the "evolving standards of decency" espoused by the United States Supreme Court in Trop v. Dulles, 356 U.S. 86 (1958). The answer to this question is not easy and involves the analysis of several factors including the use of the particular method by other states. Although electrocution as the judicial method of execution has been

abandoned in a number of states in favor of, for the must part, lethal injection,[2] that factor does not dispose of the issue.[3]

In Jones v. State, 701 So. 2d 76 (Fla. 1997), cert. denied, 118 S. Ct. 1297 (1998), this Court reiterated its prior determination that death by electrocution is not per se cruel and unusual punishment under the Eighth Amendment. See also Medina v. State, 690 So. 2d 1241 (Fla.), cert. denied, 117 S. Ct. 1330 (1997). And, citing to Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995), and Campbell v. Wood, 18 F.3d 662 (9th Cir. 1994), we indicated that the question of whether electrocution was unusual because it was used in only six states[4] was subsumed in the larger question of per se unconstitutionality. In Hunt, the court addressed the constitutionality of judicial execution by lethal gas[5] and, in Campbell, the court addressed judicial execution by hanging.[6]

---

[2] This supposed more "humane" method of execution has come under Eighth Amendment attack and I suspect will generate even more litigation over the next few years. See Hunt v. Smith, 856 F. Supp. 251 (D. Md. 1994), aff'd sub nom. Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995).

[3] Only one state, Utah, uses the firing squad as its method of judicial execution.

[4] The use of electrocution as the sole method of judicial execution is now used in only four states: Alabama, Georgia, Florida and Nebraska.

[5] Lethal gas as a judicial method of execution is provided for in several states, including: Missouri and North Carolina. Both Maryland and California have now changed to lethal injection as the method of execution.

[6] Hanging as a method of execution takes place in only Washington and Montana, and in both states, lethal injection can be chosen by the defendant.

In both cases the courts were asked to declare the methods of execution cruel and unusual because they were only used by a few states, and many states had abandoned the methods in favor of lethal injection.[7] In making the determination that neither lethal gas nor hanging was violative of the Eighth Amendment, the Ninth and Fourth Circuits looked to other objective factors when possible. In Campbell, the court stated:

> [M]ethodology review focuses more heavily on objective evidence of the pain involved in the challenged method. See, e.g., Glass v. Louisiana, 471 U.S. at 1084, 105 S. Ct. at 2162 (Brennan, J., dissenting)(noting that "[f]irst and foremost" among the "objective factors by which courts should evaluate the constitutionality of a challenged method of punishment" is whether the method involves " 'the unnecessary and wanton infliction of pain.' " (Citation omitted.)) The number of states using hanging is evidence of public perception, but sheds no light on the actual pain that may or may not attend the practice. We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice.

Campbell, 18 F.3d at 682 (footnote omitted). In Hunt, the court made a similar observation in reference to the use of lethal gas when it opined:

---

[7] In Hunt v. Nuth, 57 F.3d 1327, 1338 (4th Cir. 1995), the circuit court did not address, based on mootness grounds, the defendant's argument that execution by lethal injection violated the Eighth Amendment prohibition against cruel and unusual punishment because lethal injection violated federal drug laws and could inflict cruel and inhumane treatment as a result of botched executions.

> Despite the court's thorough opinion,[8] we decline Hunt's invitation to become the first court to follow the reasoning in Fierro. Lethal gas currently may not be the most humane method of execution–assuming that there could be a humane method of execution–but the existence and adoption of more humane methods does not automatically render a contested method cruel and unusual. Before Fierro, a number of courts had held that execution by lethal gas did not violate the Eighth Amendment. Furthermore, we agree with the district court in Hunt's case that "graphic descriptions of the death throes of inmates executed by gas are full of prose calculated to invoke sympathy, but insufficient to demonstrate that execution by the administration of gas involves the wanton and unnecessary infliction of pain." Hunt III, 856 F. Supp. at 260; see also Campbell, 18 F.3d at 683.

Hunt, 57 F.3d at 1337-38 (citations omitted). Thus, both courts reject the notion that a method of execution is cruel and unusual because it is not a popular method.

Another objective criteria that the ninth circuit focused on was the role of the legislature in determining the appropriate punishment for crimes. The court in Campbell, quoting from Gregg v. Georgia, 428 U.S. 153 (1976), stated that a punishment selected by a duly elected legislature is presumed constitutional. This presumption holds true even if the legislature does not select the least severe penalty, so long as the penalty selected is not cruelly inhumane or disproportionate

---

[8] The district court in Fierro v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994), vacated sub nom. Fierro v. Terhune, 147 F.3d 1158 (9th Cir. 1998), declared unconstitutional the California statute that required or permitted execution by lethal gas.

to the crime involved. The Court in Gregg said:

> [T]he requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power.
>
> > "Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not." Furman v. Georgia, 408 U.S., at 313-314 (White, J., concurring).
>
> See also Id., at 433 (Powell, J., dissenting).

Gregg, 428 U.S. at 174. In evaluating the constitutionality of legislative action, the judiciary should not be swayed by its own individual notion of whether or not the particular judge would have chosen another course. Courts should instead give effect to the legislative enactment as a reflection of the will and the moral values of the people. However, while the laws and statutes enacted by the people's duly elected representatives are some evidence of contemporary values, again this is not determinative.

When drafting the Eighth Amendment, the framers of our constitution were primarily concerned with proscribing torturous or barbarous punishments. See Furman v. Georgia, 408 U.S. 238 (1972). As a consequence, the primary objective factor, in addition to legislative action, that bears on the issue of the constitutionality of a particular method of execution is whether or not that method involves the "unnecessary and wanton infliction of pain." On that issue, in regards to the execution of Allen Lee Davis, the trial court found:

> Allen Lee Davis did not suffer any conscious pain while being electrocuted in Florida's electric chair. Rather, he suffered instantaneous and painless death once the current was applied to him.
>
> The nose bleed incurred by Allen Lee Davis began before the electrical current was applied to him, and was not caused whatsoever by the application of electrical current to Davis. This Court is unable to make a finding regarding the exact cause or situs of initial onset of the nose bleed because that information was not determined during either of the autopsies performed on Davis' body.
>
> The post-execution photographs of Allen Lee Davis indicate that the straps used to restrain Davis' body, specifically, the mouth strap and chin strap, may have caused Davis to suffer some discomfort. However, the straps did not cause him to suffer unnecessary and wanton pain, and the mouth strap was not a part of the electrical operation of the electric chair.

The trial court's findings are based on substantial competent evidence that was adduced at the evidentiary hearing and must be upheld. See Tibbs v. State, 397

So. 2d 1120 (Fla. 1981), aff'd, 457 U.S. 31 (1982). These findings support the trial court's ultimate conclusion that electrocution as a form of execution does not constitute cruel and unusual punishment.

In my estimation, little has changed since our analysis of this situation in Jones v. State. The pictures of the blood generated by Davis's nosebleed are not pleasant. However, we must keep in mind that the nosebleed does not per se relate to the proper functioning of the electric chair. The two issues are not, under the circumstances of this case, intertwined.

I join in the trial court's suggestion to the Department of Corrections that the mouth strap should be replaced or other sizes used depending on the size of the inmate. Such a change, assuming the bleeding and the facial discoloration resulted from the placement of the mouth strap, should eliminate some of the "ghastliness" associated with the photographs of the Davis body, and eliminate some of the human error that seems to plague this form of execution.

For the reasons stated above, I would affirm the trial court's determination that Florida's use of electrocution as the sole method of execution is not cruel and unusual punishment.

WELLS, J., concurs.

SHAW, J., dissenting.

The overarching question presented in this case is whether continued use of electrocution as the official method of execution in Florida comports with the state and federal constitutions. This question has not been directly confronted by this Court in any case--despite a widespread belief that the issue has been duly decided. At most, this Court on one occasion has conducted a "snapshot" review of the execution apparatus, i.e., the electric chair, and concluded that use of the chair at that point in time did not violate the constitution because any problems had been fixed and inmates suffered no conscious pain.[9] The Court did not address violence or mutilation or the per se constitutionality of electrocution as a mode of execution in Florida. That issue was procedurally barred:

> The claim that execution by electrocution is unconstitutional per se is hereby denied as procedurally barred as it could have been raised in previous petitions for relief.

Jones v. Butterworth, 691 So. 2d 481, 482 (Fla. 1997) (emphasis added).

In light of continuing malfunctions and mishaps with this method of execution in Florida, I am convinced that the time has now come to confront this issue head-on, and it is my conclusion that electrocution as it has been

---

[9] See Jones v. State, 701 So. 2d 76 (Fla. 1997), cert. denied, 118 S. Ct. 1297 (1998).

administered in Florida is unconstitutional. I would direct that the sentence in the present case be carried out by lethal injection as prescribed by statute.[10]

I. FACTS

Following the recent bloody execution of Allen Lee Davis on July 8, 1999, this Court remanded the present case to the trial court to conduct an evidentiary hearing on a single narrow issue--the present functioning of Florida's electric chair. At the conclusion of the hearing, the trial court inter alia made two findings despite considerable evidence to the contrary: (1) Florida's electric chair functioned as intended during the Davis execution; and (2) Davis suffered no conscious pain. The court ruled as follows:

> Execution by electrocution in Florida's electric chair as it exists in its present condition as applied does not constitute cruel or unusual punishment, and therefore, is not unconstitutional.

(Emphasis added.) The court focused only on the question before it and did not address the issues of violence or mutilation or the overall record of electrocution as a method of execution in Florida.

The present majority opinion affirms the conclusion of the trial court,

---

[10] See § 922.105(1), Fla. Stat. (Supp. 1998) ("If electrocution is held to be unconstitutional . . . all persons sentenced to death for a capital crime shall be executed by lethal injection.").

focusing on the present functioning of the chair and the lack of pain:

> This Court recently concluded in Jones v. State, 701 So. 2d 76, 79 (Fla. 1997), that "[i]n order for a punishment to constitute cruel or unusual punishment, it must involve 'torture or lingering death' or the infliction of 'unnecessary and wanton pain.'" (citing Gregg v. Georgia, 428 U.S. 153 (1976), and Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). The record in this case reveals abundant evidence that execution by electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain. The record also contains evidence that the electric chair is and has been functioning properly and that the electrical circuitry is being maintained.

Majority op. at 4. The majority opinion then proceeds to extrapolate from the narrow "snapshot" ruling of the trial court and concludes broadly that use of Florida's electric chair in general is not cruel or unusual punishment, citing Jones v. State, 701 So. 2d 76 (Fla. 1997):

> In Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997), this Court stated, "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" We find that the circuit court's findings of fact are supported by competent substantial evidence. Therefore, we again conclude, as we did in Jones, that Florida's electric chair is not cruel or unusual punishment.

Majority op. at 4-5 (emphasis added). The majority opinion summarily rejects

Provenzano's "evolving standards of decency" claim, again citing Jones:

> In issue two, Provenzano claims that Florida's current use of electrocution as its sole method of execution is unconstitutional because it violates the evolving standards of decency that mark the progress of a maturing society. This claim was rejected by this court in Jones. See 701 So. 2d at 79.

Majority op. at 5 (emphasis added).

This reliance on Jones is misplaced. Contrary to what the majority opinion assumes, the trial courts both in Jones and the present case never reached the broad issue of the per se constitutionality of electrocution as a method of execution in Florida--that issue was beyond the scope of the evidentiary hearings in both cases. Nor did this Court in Jones address this issue--for the issue was found to be procedurally barred.

II. FLORIDA'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE

Article I, section 17, Florida Constitution, proscribes punishments that are "cruel and unusual":

> SECTION 17. Excessive punishments.-- Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

Art. I, § 17, Fla. Const. (emphasis added). The question posed in the present case is whether this prohibition bars the use of electrocution as the official method of

execution in Florida.

The present majority opinion relies on Jones v. State, 701 So. 2d 76 (Fla. . 1997), to resolve this issue. Following the fiery execution of Pedro Medina in 1997, this Court remanded Jones' case to the trial court to conduct an evidentiary hearing on the limited issue of whether use of Florida's electric chair in its then-current condition constituted "cruel or unusual" punishment. Jones v. Butterworth, 691 So. 2d 481 (Fla. 1997). The trial court found that the malfunction (an improperly moistened sponge in the head-piece) had been fixed, that the chair was now working properly, and that Medina had suffered no conscious pain. This Court affirmed.

This Court refused to consider Jones' contention that electrocution in general is unconstitutional under evolving standards of decency. The Court explained:

> Jones also argues that the trial judge erred in refusing to admit and consider evidence that execution in Florida is unusual because there is a trend away from execution through the use of the electric chair as a means of capital punishment and because only six states currently employ the electric chair as a means of execution. The trial judge properly excluded this evidence as being beyond the scope of the issue which he had been assigned to decide. Our previous ruling that execution by the use of the electric chair is not per se unconstitutional subsumed the argument that Jones

> now makes. See Campbell v. Wood, 18 F.3d 662, 682 (9th Cir. 1994) ("We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice."); Hunt v. Nuth, 57 F.3d 1327, 1338 (4th Cir. 1995) ("[T]he existence and adoption of more humane methods [of execution] does not automatically render a contested method cruel and unusual.").

Jones, 701 So. 2d at 79 (emphasis added)(footnote omitted). The Court ultimately held as follows: "We hold that electrocution in Florida's electric chair in its present condition is not cruel or unusual punishment." Id. at 80 (emphasis added).

It is clear from the above that this Court--and the trial court--did not address the issue of whether Medina suffered undue violence or mutilation or whether electrocution is constitutional as the traditional method of execution in Florida. Rather, the Court conducted a "snapshot" review of the current functioning of Florida's electric chair--i.e., the Court limited its review to whether the electric chair was working properly at that point in time and whether Medina had suffered unnecessary pain. The Court disposed of Jones' per se constitutionality claim by referring to its earlier ruling in the case. ("Our previous ruling that execution by the use of the electric chair is not per se unconstitutional subsumed the [evolving standards of decency] argument that

Jones now makes." Id.) A review of that earlier ruling, however, shows that the Court never addressed the per se constitutionality issue on the merits but rather disposed of it procedurally.[11] Nowhere in our two decisions in Leo Jones' case did the Court directly address this issue; it was never properly before the Court.

A review of this Court's death penalty precedent reveals that in those cases in which this issue was raised, the Court disposed of the matter in summary fashion without analysis.[12] The State points to no case from this Court where this method of execution was subjected to explicit constitutional scrutiny. Existing Florida precedent construing the Cruel and Unusual Punishment Clause in other situations offers little insight. Accordingly, this Court is obliged to turn to United

---

[11] See Jones v. Butterworth, 691 So. 2d 481, 482 (Fla. 1997) ("The claim that execution by electrocution is unconstitutional per se is hereby denied as procedurally barred as it could have been raised in previous petitions for relief." (Emphasis added.)).

[12] See, e.g., White v. State, 729 So. 2d 909, 911 & n.4 (Fla. 1999)(rejecting the constitutionality issue "as without merit"); Remeta v. State, 710 So. 2d 543, 546 (Fla.)(stating that defendant was entitled to "no relief" on the constitutionality issue), cert. denied, 118 S. Ct. 1383 (1998); Elledge v. State, 706 So. 2d 1340, 1347 & n.9 (Fla. 1997)(stating that the constitutionality issue had "already been decided adversely to Elledge"), cert. denied, 119 So. 2d 366 (1998); Pooler v. State, 704 So. 2d 1375, 1381 (Fla. 1997)(noting that the claim had been "previously rejected . . . as meritless"), cert. denied, 119 S.Ct. 119 (1998); Hoskins v. State, 702 So. 2d 202, 208 (Fla. 1997)(rejecting the claim as "without merit" and noting the claim had been "repeatedly rejected" by this Court); Consalvo v. State, 697 So. 2d 805, 811-12 (Fla. 1996)(noting that the claim had been "previously rejected by this Court and do[es] not require additional discussion"), cert. denied, 118 S.Ct. 1681 (1998); Hunter v. State, 660 So. 2d 244, 253 (Fla. 1995)(ruling that the issue was procedurally barred, but even if not barred the issue had been rejected previously); Fotopoulos v. State, 608 So. 2d 784, 794 & n.7 (Fla. 1992)(finding that the claim was procedurally barred, but even if not barred the claim "lack[ed] merit").

States Supreme Court precedent for guidance.

III. FEDERAL CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

The Eighth Amendment to the United States Constitution bars punishments that are "cruel and unusual":

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII (emphasis added). This provision is of key importance in evaluating the lawfulness of a method of execution.

A. The Kemmler Standard--"Mere Extinguishment of Life"

The United States Supreme Court last confronted a "method of execution" case in In re Kemmler, 136 U.S. 436 (1890), the case that inaugurated electrocution as a method of execution in this country.[13] That case is still the seminal case in this field and, contrary to popular belief, does not stand for the proposition that electrocution is per se lawful ad infinitum if there is no pain.[14]

---

[13] Prior to Kemmler, the United States Supreme Court addressed (with approval) shooting as a method of execution in the Territory of Utah. See Wilkerson v.Utah, 99 U.S. 130 (1878).

[14] See generally Poyner v. Murray, 508 U.S. 931, 933 (1993) (Souter, J., joined by Blackmun and Stevens, JJ., dissenting from denial of certiorari) ("The Court has not spoken squarely on the underlying issue since In re Kemmler, and the holding of that case does not constitute a dispositive response to litigation of the issue in light of modern knowledge about the method of execution in question.). I note that Kemmler was decided on a limited evidentiary basis--no one had yet been executed by electrocution.

Rather, the Court in Kemmler simply acceded to the state court's finding that--given the available options at that point in time in the nineteenth century--electrocution was permissible as a more humane form of execution than hanging. As explained below, the enduring legal principle articulated in that case--i.e., the Kemmler standard--is far more broad and goes to the very heart of the Eighth Amendment.

The Court in In re Kemmler, 136 U.S. 436 (1890), was asked to invalidate New York's newly enacted statutory scheme, which replaced hanging with electrocution as the official method of execution. The Court declined to invalidate the statute. First, the Court noted that death by hanging had been recognized by the governor of New York to be barbaric, and that the governor had called upon the state legislature to find a better method:

> It appears that the first step which led to the enactment of the law was a statement contained in the annual message of the governor of the State of New York, transmitted to the legislature January 6, 1885, as follows: "The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the legislature."

Id. at 444. Second, the Court pointed out that the state legislature had acted

faithfully on the governor's commendation:

> The legislature accordingly appointed a commission to investigate and report "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." This commission reported in favor of execution by electricity, and accompanied their report by a bill which was enacted and became chapter 489 of the Laws of 1888.

Id. And finally, the Court noted that: (a) the state legislature had determined that electrocution was a more humane method of punishment; (b) the trial court had collected a "voluminous mass of evidence" on both sides of the issue and had reached the same conclusion, and (c) the state courts at every level had agreed with that conclusion.

In addressing the Cruel and Unusual Punishments Clause in this context,[15] the United States Supreme Court set forth what has become known as the Kemmler standard. That standard, which bars anything more than "the mere extinguishment of life," is now the abiding criterion for evaluating the constitutionality of a method of execution:

> Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel

---

[15] The Cruel and Unusual Punishments Clause was inapplicable to the states at that time. See Kemmler, 136 U.S. at 446. See also Robinson v. California, 370 U.S. 660 (1962) (extending the Eighth Amendment to the states via the Fourteenth Amendment).

> within the meaning of that word as used in the Constitution. [Cruelty] implies . . . something inhuman and barbarous,--something more than the mere extinguishment of life.

Id. at 447 (emphasis added). In short, to comport with the constitution, a method of execution is limited to "the mere extinguishment of life"--to the extent that this is reasonably possible. Any adverse effect beyond that point (i.e., any undue pain, violence, mutilation, or disgrace) is gratuitous and thus "inhuman and barbarous." The Court ultimately deferred to the state legislature's and courts' determination that electrocution was a more humane method of execution than hanging and declined to invalidate the New York statute. Id. at 449.

Although the United States Supreme Court has not confronted a "method of execution" case since Kemmler, the Court has ruled on a number of other government practices under the Cruel and Unusual Punishments Clause, as explained below. The Kemmler standard is reaffirmed in many of these cases. In reviewing these cases, a broad schematic for construing the Clause in "method of execution" cases emerges, embracing the following points: (1) While pain is a relevant indicator of cruelty, it is not the only indicator; (2) violence, mutilation, and disgrace are also relevant indicators of cruelty; and (3) the legal dimensions of cruelty are measurable against evolving standards of decency.

1. Undue Pain

In the olden days, a common component of punishments meted out by the crown was the intentional infliction of pain, violence, mutilation, and disgrace, for the crown viewed wanton cruelty as both a deterrent and a mode of vengeance and retribution. Upon our nation's birth, however, the Cruel and Unusual Punishments Clause was erected by the founding fathers as a resolute barrier to this repugnant practice, particularly where methods of execution were concerned.[16] While some degree of suffering is unavoidable in any means of taking life, the Clause focuses on any excessive cruelty which inheres in the method of execution--not that inevitable suffering which exists in the mind of the

---

[16] Justice Brennan addressed this issue in Glass v. Louisiana, 471 U.S. 1080 (1985), reaffirming the Kemmler standard:

> The Court has never accepted the proposition that notions of deterrence or retribution might legitimately be served through the infliction of pain beyond that which is minimally necessary to terminate an individual's life. Thus in explaining the obvious unconstitutionality of such ancient practices as disembowelling while alive, drawing and quartering, public dissection, burning alive at the stake, crucifixion, and breaking at the wheel, the Court has emphasized that the Eighth Amendment forbids "inhuman and barbarous" methods of execution that go at all beyond "the mere extinguishment of life" and cause "torture or a lingering death." It is beyond debate that the Amendment proscribes all forms of "unnecessary cruelty" that cause gratuitous "terror, pain, or disgrace."

Glass, 471 U.S. at 1084 (Brennan, J., dissenting from denial of certiorari) (citation and footnote omitted). See also Gregg v. Georgia, 428 U.S. 153, 173 (1976) ("[T]he punishment must not involve the unnecessary and wanton infliction of pain.").

condemned.[17]

To meet the requirement that a punishment not be impermissibly cruel, a method of execution first of all must inflict no undue pain. As the United States Supreme Court stated: "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence." Louisiana ex rel. Francis v. Resweber, 329 U.S. at 463.

> The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death it self.

Id. at 474 (Burton, J., dissenting).

California's gas chamber has been found to be impermissibly cruel under this test, for while lethal gas as applied in California involves minimal violence and mutilation, it inflicts substantial pain (i.e., intense visceral pain from oxygen deprivation) and results in a slow, lingering death akin to artificial drowning (i.e., the inmate may remain conscious for several minutes) and thus is cruel in its effect.[18] Execution by gas is to be distinguished from lethal injection, which is

---

[17] See generally Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947) ("The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.").

[18] The United States Court of Appeals, Ninth Circuit, described the effects of lethal gas as applied in California:

generally considered more humane.[19]

2. Undue Violence, Mutilation, and Disgrace

Although pain is an important indicator of cruelty, it is not the only indicator--for a method of execution can involve minimal pain and yet still be extraordinarily cruel. To meet the requirement that a punishment not be impermissibly cruel, a method of execution also must entail no undue violence, mutilation, or disgrace:

> The Eighth Amendment's protection of "the dignity of man" extends beyond prohibiting the unnecessary infliction of pain when extinguishing life. Civilized standards, for example, require a minimization

---

> [I]nmates who are put to death in the gas chamber at San Quentin do not become immediately unconscious upon the first breath of lethal gas. . . . [A]n inmate probably remains conscious anywhere from 15 seconds to one minute, and . . . there is a substantial likelihood that consciousness, or a waxing and waning of consciousness, persists for several additional minutes. During this time, . . . inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells. The experience of "air hunger" is akin to the experience of a major heart attack, or to being held under water. Other possible effects of the cyanide gas include tetany, an exquisitely painful contraction of the muscles, and painful build-up of lactic acid and adrenaline. Cyanide-induced cellular suffocation causes anxiety, panic, terror, and pain.

Fierro v. Gomez, 77 F.3d 301, 308 (9th Cir.)(quoting Fierro v. Gomez, 865 F.Supp. 1387, 1404 (N.D.Cal.1994)), vacated and remanded for reconsideration, 519 U.S. 918 (1996), remanded, Fierro v. Terhune, 147 F.3d 1158 (9th Cir. 1998).

[19] See generally Kristina E. Beard, Comment, Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause, 51 U. Miami L.Rev. 445, 465 (1997) ("By most accounts, lethal injection involves minimal pain, and there is little apparent violence or bodily mutilation.").

> of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. Similarly, basic notions of human dignity command that the State minimize "mutilation" and "distortion" of the condemned prisoner's body.

Glass, 471 U.S. at 1085 (Brennan, J., dissenting from denial of certiorari).[20]

As conceded by the State in the present proceeding, the guillotine as used in the French Revolution is a prime example of a method that would fail in this regard, for while beheading results in a quick, relatively painless death,[21] it entails frank violence (i.e., gross laceration and blood-letting) and mutilation (i.e., decapitation) and disgrace (i.e., public spectacle) and thus is facially cruel. Post-execution disfigurement--e.g., dismemberment, disembowelment, decapitation, flaying, or dragging of the body--and displaying of the mutilated corpse similarly would be forbidden even though this practice involves no conscious pain. Forced public disrobing prior to execution also would be forbidden.

---

[20] See also Campbell v. Wood, 114 S. Ct. 2125, 2127 (1994) (Blackmun, J., dissenting from denial of certiorari) ("[P]ainless, post mortem punishments such as public display, drawing and quartering, and mutilation also violate the Eighth Amendment."); Rupe v. Wood, 863 F. Supp. 1307, 1315 (W.D. Wash. 1994) ("Supreme Court cases discussing the history of the Eighth Amendment make clear that decapitation and similar mutilation, even if accomplished after death and thus perhaps without 'unnecessary and wanton infliction of pain,' offend basic human dignity."); Thomas v. Jones, 742 F. Supp. 598, 603 (S.D. Ala. 1990) ("Every case the Court reviewed dealing with electrocution acknowledged that painful electrocution, or excessive burning and mutilation might violate the Eighth Amendment." (Emphasis added.)).

[21] See generally Robert J. Sech, Note, Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods, 30 Val. U.L.Rev. 381 (1995).

In the present case, the State in oral argument before this Court conceded that use of the guillotine as a method of execution would fail constitutional muster in all states under the Cruel and Unusual Punishments Clause. By this concession, the State--of necessity--agrees that there are other indicators of cruelty besides pain. I suggest that these additional indicators inhere in the method of execution. Thus far in Florida, we have suppressed any reasoned consideration of these additional factors by limiting the scope of the inquiry at the evidentiary hearings, wherein the courts have focused only on pain.

B. Evolving Standards of Decency

Subsequent to its decision in Kemmler, the United States Supreme Court concluded that the Constitution--in order to retain meaning and effect--must exist in our society as a dynamic force.[22] The Court then articulated a new standard for evaluating certain government practices under the Cruel and Unusual Punishments Clause--the "evolving standards of decency" criterion:

> The Court [has] recognized . . . that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

---

[22] See Weems v. United States, 217 U.S. 349, 373 (1910) ("In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.").

Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (emphasis added).[23] The Supreme Court has reviewed a number of government practices under this standard, including the imposition of the death penalty for various offenses.[24] This review generally includes three considerations: (1) Whether the practice has been approved, rejected, or abandoned in other states;[25] (2) whether the practice has been approved, rejected, or abandoned by the governments of other civilized nations;[26] and (3) whether other less cruel modes of punishment are available.[27]

---

[23] The Court in Trop held that forced relinquishment of citizenship as punishment for misconduct while in the military violates the Eighth Amendment.

[24] See, e.g., Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that it is not cruel and unusual to execute the mentally retarded); Ford v. Wainwright, 477 U.S. 399 (1986) (holding that it is cruel and unusual to execute the insane); Enmund v. Florida, 458 U.S. 782 (1982) (holding the death penalty disproportionately cruel and unusual when imposed for aiding and abetting a robbery resulting in murder); Coker v. Georgia, 433 U.S. 584 (1977) (holding the death penalty disproportionately cruel and unusual when imposed for the crime of rape).

[25] See, e.g., Coker.

[26] See, e.g., Trop.

[27] Justice Powell noted the following in Furman v. Georgia, 408 U.S. 238 (1972):

> Neither the Congress nor any state legislature would today tolerate pillorying, branding, or cropping or nailing of the ears--punishments that were in existence during our colonial era. Should, however, any such punishment be prescribed, the courts would certainly enjoin its execution. Likewise, no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.

Id., 408 U.S. at 430 (Powell, J., dissenting) (citation and footnote omitted) (emphasis added). Justice Powell's views in Furman were largely adopted by the Court in Gregg v. Georgia, 428 U.S. 153 (1976).

C. Analysis Used by Lower Federal Courts

Unlike the United States Supreme Court, the lower federal courts have ruled on the constitutionality of several methods of execution in recent years. The analytical model that emerges from these rulings has two steps. The court first determines whether a method of execution is limited to "the mere extinguishment of life." If the method is not so limited and entails adverse effects beyond that point, the court then must determine if these effects are "undue." To assist in this second step, the court may apply the "evolving standards of decency" criterion. Two federal circuit court cases are instructive.[28]

The Ninth Circuit in Campbell v. Wood, 18 F.3d 662 (9th Cir.1994), upheld the State of Washington's alternative method of execution,[29] hanging, against a challenge under the Cruel and Unusual Punishments Clause.[30] After

---

[28] In two additional cases, the federal circuit court reviewed a method of execution but did not conduct an in-depth constitutional analysis. In both cases, there had been no evidentiary hearing below, and the circuit court deferred to precedent approving the method under review. See Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995) (upholding lethal gas in Maryland); Gray v. Lucas, 710 F.2d 1048 (5th Cir. 1983) (upholding lethal gas in Mississippi).

[29] Under the Washington scheme at that time, a defendant could choose the method of execution, either hanging or lethal injection, with the default falling to hanging. See Wash. Rev. Code 10.95.180(1) (1994). This statute was later amended to allow the default to fall to lethal injection. See Wash. Rev. Code 10.95.180(1) (1994).

[30] But see Rupe v. Wood, 863 F. Supp. 1307 (W.D. Wash. 1994) (holding that execution by hanging under the Washington protocol presented a substantial risk of decapitation for Rupe, who was obese, and thus violated the Cruel and Unusual Punishments Clause). The district court's decision in Rupe was vacated on appeal after the Washington Legislature amended the

conducting an evidentiary hearing on the issue, the trial court noted two points: (1) Hanging in Washington is conducted pursuant to "Field Instruction WSP 410.500," an exhaustively detailed execution protocol adopted from the military; and (2) after adoption of the protocol, the only hanging conducted in the state had been performed flawlessly several years earlier.[31] Campbell, 18 F.3d at 683, 685. The trial court then concluded that "hanging according to the protocol does not involve lingering death, mutilation, or the unnecessary and wanton infliction of pain." Id. at 687. The circuit court deferred to the trial court's findings and declined to conduct an "evolving standards of decency" analysis. Id. at 682. There was no point in looking at other states; execution by hanging as carried out in Washington clearly entailed no undue pain or mutilation.[32]

Two years later, the Ninth Circuit in Fiero v. Gomez, 77 F.3d 301 (9th Cir. 1996), held California's alternative method of execution,[33] lethal gas,

---

statute (which offered a choice of method--hanging or lethal injection--with the default falling to hanging) to allow the default to fall to lethal injection. See Rupe v. Wood, 93 F.3d 1434 (9th Cir. 1996).

[31] Westley Allan Dodd was the only person to be executed by hanging in the United States since 1963. See Campbell, 18 F.3d at 700 (Reinhardt, J., dissenting).

[32] But see Campbell v. Wood, 511 U.S. 1119, 1120-21 (1994) (Blackmun, J., dissenting) (contending that the Ninth Circuit should have conducted an analysis under the "evolving standards of decency" criterion).

[33] Under the California scheme at that time, a defendant could choose the method of execution, either lethal gas or injection, with the default falling to lethal gas. Cal. Penal Code §

unconstitutional. The trial court had conducted an eight-day bench trial on the issue and concluded that lethal gas as applied in California resulted in extreme physical pain. The circuit court again deferred to the trial court's findings and declined to conduct an "evolving standards of decency" analysis. Id. at 308. There was no point in looking at other states; execution by lethal gas as carried out in California clearly entailed undue pain.

Although the Ninth Circuit in both Campbell and Fiero declined to apply the "evolving standards of decency" criterion, this was due to the particular facts of those cases. In the eyes of the court, the proper result in each case was clear-cut and was dictated by circumstances in the home state. The court did not hold that the "evolving standards of decency" criterion could never be used in a "method of execution" case--for logic suggests that the criterion would be helpful in a case where the constitutionality vel non of the method is not clear-cut (which is the situation in the present case).

IV. THREE RECENT EXECUTIONS

The administration of electrocution in Florida demonstrates the cruelty inherent in this method of execution. Not only was every execution in Florida

---

3604(b) (West Supp. 1995). This statute was later amended to allow the default to fall to lethal injection. Cal. Penal Code § 3604(b) (West Supp. 1996).

accompanied by the inevitable convulsing and burning that characterizes electrocution,[34] but further, three executions in particular were marred by extraordinary violence and mutilation. In two of these executions, smoke and flames spurted from the headpiece and burned the heads and faces of the inmates. In the third execution, the inmate bled from the nostrils and was at least partially asphyxiated by the restraining devices; and he too was burned.

A. Tafero's Execution

Florida's electric chair malfunctioned during the execution of Jesse Tafero on May 4, 1990, resulting in a violent scene, with smoke and foot-long flames spurting from his head. This Court described the scene:

> When Tafero's execution began, smoke and flames instantaneously spurted from his head for a distance of as much as twelve inches. The flames and smoke emanated from the area around a metallic skull cap, inside of which was a saline-soaked synthetic sponge meant to increase the flow of electricity to the head. The cap is the source of electricity administered to condemned prisoners by the electric chair.
>
> Because of the smoke and flames, officials of the Department of Corrections stopped the first surge of electricity. A second jolt again resulted in smoke and flames spurting from Tafero's head. Finally, a third jolt of electricity was administered. A medical examiner found that Tafero was dead some six or seven minutes after the execution commenced.

---

[34] See generally Jones, 701 So. 2d at 82-88 (Shaw, J., dissenting).

> Thereafter, the Governor ordered the Department of Corrections to conduct an investigation into the circumstances of Tafero's execution. The Department reported that the equipment was in proper working order. However, it was determined that for the first time a synthetic, rather than a natural, sponge had been used in the headpiece. The Department concluded that the burning of the sponge caused the flames and smoke which were seen during Tafero's execution . . . . The Department . . . noted that most executions last longer than seven minutes.

Buenoano v. State, 565 So.2d 309, 310-11 (Fla.1990).

The mutilated condition of Tafero's body was described in the sworn statement of a witness:

> I have seen the bodies of three other inmates executed by officials of the Florida State Prison. I saw them at approximately the same length of time after they were executed as I saw Mr. Tafero's body. None of the other bodies I saw before had the severe burning and scorching and damage to the head as did Mr. Tafero's. None had any marks on the face at all.
>
> The entire top of Mr. Tafero's head is covered with wounds. There is one dominant charred area and a myriad of smaller gouged, raw areas to the upper right side and lower right of the large burned area.
>
> The dominant charred area is on the top left side of the head. It is larger than my hand. . . . The funeral director said that this was a third degree burn. The rest of that area was a dark brownish color, slightly lighter than the charred area. The funeral director said that this would be a second degree burn.

Id. at 314 (Kogan, J., dissenting). Additionally, Tafero's eyebrows, eyelashes,

and facial hair were burned when flames licked his face. See Jones, 701 So. 2d at 87 (Shaw, J., dissenting).

B. Medina's Execution

Florida's electric chair malfunctioned again during the execution of Pedro Medina on March 25, 1997, resulting in another violent scene with smoke and flames spurting from the head-piece. Unlike Tafero, Medina's eyebrows, eyelashes, and facial hair were not burned off. However, Medina's head was charred and his face was scalded. The trial court in Jones described the execution:

> When Pedro Medina was executed on March 25, 1997, the following events occurred. When the electrical current was activated, within seconds . . . smoke emanated from under the right side of Medina's head piece, followed by a 4 to 5 inch yellow-orange flame which lasted 4 to 5 seconds and then disappeared. After the flame went out, more smoke emanated from under the head piece to the extent that the death chamber was filled with smoke--but the smoke was not dense enough to impair visibility in or through the chamber. The smoke continued until the electrical current was shut off in the middle of the third cycle. Although several witnesses to the execution tried to describe the odor of the smoke, only one witness, Florida State Prison Superintendent Ronald McAndrews, described the odor as burnt sponge. . . . This Court finds that the odor smelled was burnt sponge, not burnt flesh.
>
> The physician's assistant, William Mathews,

> examined Medina's body. At that time, Medina was not breathing or exchanging air through his nostrils; his pupils were fixed and dilated; and he had an agonal pulse and heart sounds. When the physician's assistant was no longer able to detect any pulse or heart sounds, the attending physician, Dr. Almojera, examined Medina and pronounced him dead at 7:10 a.m. During Dr. Almojera's last examination Medina's chest was seen to move two or three times in a two to four minute period. A couple of witnesses thought Medina was trying to breathe. Several witnesses did not describe it as attempted breathing, but as a lurching, spasmodic movement, a shudder, and outward not upward movement. No witness, particularly those closest to Medina, could state that he was in fact breathing or attempting to breathe.

Jones, 701 So. 2d at 86 (Shaw, J., dissenting).

As with Tafero's body, Medina's body also was mutilated by the electrocution. The findings of the pathologists who conducted the autopsy of Medina were summarized by the trial court in Jones:

> 1. The head had a "burn ring" on the crown of the head that was common in executions by judicial electrocution.
>
> 2. Within the "burn ring" there was a third degree burn on the crown of the head, with deposits of charred material. . . .
>
> 3. There was a first degree burn of the upper front face and head, caused by scalding steam. . . . Unlike the Tafero execution, Medina had no burning of the eyebrows, eyelashes, or small hairs of the face that would have resulted if the burning had been the result of a flame rather than steam.

Jones, 701 So. 2d at 86-87 (Shaw, J., dissenting).

C. Davis' Execution

The execution of Allen Lee Davis on July 8, 1999, differed from prior executions in that here Department of Corrections ("DOC") officials took post-execution color photos of Davis before he was removed from the electric chair. (Several of the photos are appended to this dissenting opinion.) These photos, when combined with eye witness accounts, provide a vivid picture of a violent scene. According to witnesses' accounts, when Davis was being strapped into the chair, guards placed a solid leather mouth-strap across his mouth and nose area. This mouth-strap is wide--approximately five inches from top to bottom--and it covered the entire lower portion of Davis's face from the bottom of his chin to immediately below his nose.[35] The strap was fastened so tightly against his face and was so wide that it pushed his nose severely upward, blocking his nostrils at least partially. A heavy fabric face-mask was placed on top of this apparatus, further occluding his airway. And then, as explained below, blood began flowing from his nose prior to electrocution. This too obstructed his nostrils.

---

[35] The "mouth-strap" in fact appears to be a weight-lifter's belt or some such item. In the photos, the belt is turned backwards, so that the wide portion, which normally would support the back of the weight lifter, is placed over Davis' face. The belt is then run behind two wood rails at the back of the electric chair and buckled behind the chair.

The trial court below explained that the pathologist who conducted a post-execution autopsy on Davis concluded that he had been at least partially asphyxiated prior to electrocution:

> Robert Kirschner, M.D., forensic pathologist from Illinois, testified as an expert in the area of forensic pathology. Kirschner testified that he performed an autopsy on the body of Allen Lee Davis. He testified that during Davis's autopsy, he was unable to identify the precise source of the nose bleed that Davis suffered, but that it was coming from the septal area of the left nostril. Kirschner testified that the placement of the mouth strap across Davis' mouth inhibited Davis' breathing and caused him to become at least partially asphyxiated before the application of electrical current to him. Kirschner testified that he is of the opinion that Davis' death was caused by electrocution and association of partial asphyxiation which occurred before the electrocution. . . .
>
> . . . .
>
> Aubrey D. Thornton, Assistant Warden at Florida State Prison, testified that he was one of the individuals responsible for strapping Allen Lee Davis into the electric chair. . . . Thornton also testified that Davis' face began to turn red after the mouth strap was applied to him . . . .

(Emphasis added.) After Davis' airflow had been blocked by the mouth-strap, the face-mask, and his own blood, Davis made several sounds under the face-mask which were described variously as muffled screams, moans, or yells, as if he were attempting to get the guards' attention. The trial court gave the following

description:

> John W. Moser, Capital Collateral Regional Counsel for the Middle Region, testified that in his capacity as Capital Collateral Regional Counsel, he witnessed the execution of Allen Lee Davis. Moser testified that between the time Davis was secured in the electric-chair and the time the electrical current was applied to Davis, he heard what sounded like two screams from Davis. . . .
>
> Mark Lazarus, Victim Assistance Administrator for the Florida Department of Corrections, testified that he observed the execution of Allen Lee Davis. Lazarus testified that after the head piece was placed on Davis' head, he heard two one-syllable sounds coming from Davis and that the sounds sounded like Davis was trying to "make some noise" or "yell out." . . .
>
> . . . .
>
> Thomas Varnes, Warden at Wakulla Correctional Institution, testified that he witnessed the execution of Allen Lee Davis. Varnes testified that after the mouth strap and chin strap of the head piece were tightened and the face mask was lowered, he heard Davis moan like he was trying to say something. . . .
>
> . . . .
>
> James Crosby, Warden of Florida State Prison testified that after the mouth piece was placed on Davis, and just before the execution, he heard two muffled sounds from Davis, which sounded like Davis was trying to say something.

(Emphasis added.)

Prior to and during the electrocution, blood flowed freely from Davis' nose, ran over the mouth-strap, and spilled onto his chest, forming a pool the size of a

dinner plate on his white shirt. Again, in the words of the trial court below:

> Sheila McAllister, Correctional Probation Officer at Wakulla Correctional Institution, testified that she witnessed the execution of Allen Lee Davis. . . . McAllister also testified that while the current was on she observed blood on Davis' chest, and she observed something dripping from behind Davis' mask.
>
> . . . .
>
> Michael R. Collins, employed with Florida State Prison as a nurse, testified that he attended the execution of Allen Lee Davis. . . . Collins further testified that after the electrical current was stopped and after Mr. Matthews, the Florida State Prison physician's assistant, was examining Davis, he observed blood on Davis' shirt in his chest area and on his upper right side, by his collar. Collins stated that the blood was dripping from under the mask . . . .
>
> . . . .
>
> William Muse, Lieutenant with the Florida Department of Corrections, assigned to Florida State Prison, testified that he witnessed the execution of Allen Lee Davis. . . . Muse testified that after the cycle of current had been terminated, he observed blood on Davis' shirt, blood on the strap, and blood coming from Davis' nostril[s].

(Emphasis added.) In light of the placement of the mouth-strap, the positioning of the face-mask, and the flow of blood from his nostrils, it is reasonable to conclude--as did Dr. Kirschner--that Davis was being smothered before he was electrocuted.

And finally, as with Tafero and Medina, Davis' body was mutilated by

burns on the head, face, and leg, as noted in the trial court's order:

> The deposition of William Hamilton, M.D., Medical Examiner for the Eighth Judicial Circuit, was read into the record due to Hamilton's unavailability. . . . Hamilton testified that Davis had burns on his scalp and forehead, on his superpubic and right upper medial thigh region, and behind the right knee.

(Emphasis added.)

The color photos taken by DOC show a ghastly post-execution scene: Davis is wearing a white shirt and dark pants and is restrained in the wooden chair by thick leather straps placed across his arms, legs, torso, and mouth; the electrical head-piece is attached to the top of his head with a leather strap that runs under his chin; a sponge placed under the head-piece obscures the entire top portion of his head down to his eyebrows; because of the width of the mouth-strap, only a small portion of Davis' face is visible above the mouth-strap and below the sponge, and that portion is bright purple and scrunched tightly upwards; his eyes are clenched shut and his nose is pushed so severely upward that it is barely visible above the mouth-strap; although the exterior openings of Davis' nostrils are partially visible, it appears as though the interior openings may be covered by the mouth-strap; a stream of blood pours from his nostrils, flows over the wide leather mouth-strap, runs down his neck and chest, and forms a

bright red pool (approximately eight by twelve inches) on his white shirt. The scene is unquestionably violent.

V. ELECTROCUTION IN FLORIDA IS UNCONSTITUTIONALLY CRUEL

As noted above, the abiding standard for determining the constitutionality of a method of execution is the "mere extinguishment of life" standard set forth in In re Kemmler, 136 U.S. 436 (1890). Execution by electrocution as administered in Florida violates this standard because it entails undue violence and mutilation. Additionally, execution by electrocution as practiced in Florida is inconsistent with evolving standards of decency.

A. Electrocution Violates the Kemmler Standard

Although a total of twenty executions were carried out "successfully" in the intervening years between the Tafero, Medina, and Davis executions, this statistic is insufficient to save Florida's method of execution from constitutional infirmity. In even the "successful" executions, the inmate was subjected to violence (i.e., the inmate was administered an electrical force that caused him to convulse violently) and mutilation (i.e., the body of each inmate was burned on the head and leg as a result of the electrocution process). Additionally, in three out of twenty-three executions, i.e., in thirteen percent of executions, the prisoner was subjected to

extreme violence and mutilation when the execution was botched.[36]

In two of these botched executions (Tafero and Medina), the prisoner was engulfed in smoke and flames when the switch was pulled. The head of one prisoner (Tafero) was burned and charred, his face was licked by flames, and his eyebrows, eyelashes, and facial hair were burned; his head also was gouged and made raw with wounds. The head of another (Medina) was burned and charred and his face was scalded. In the third botched execution (Davis), the prisoner suffered blood flowing from his nose and pooling on his chest; he was likely asphyxiated at least partially prior to electrocution, and he attempted to scream or yell after his airway was occluded; he too was burned on his head, face, and leg.

Each of the botched executions was sufficiently egregious to halt further executions and to prompt an extensive official inquiry, complete with an evidentiary hearing and voluminous testimony by eye witnesses and experts. Each botched execution also was transformed by the media into a world-wide spectacle, telecommunicated throughout the world in lurid and inflammatory detail.

Following the Tafero execution, the federal district court in Florida

---

[36] See Thomas v. Jones, 742 F. Supp. 598, 603 (S.D. Ala. 1990) (acknowledging that excessive burning and mutilation during electrocution would implicate the Eighth Amendment).

addressed the issue of repeated mishaps:

> If a pattern of malfunctions develops, perhaps even as few as two consecutive or nearly consecutive executions, then it may become appropriate to consider whether the application of electrocution in Florida is infected with "an element of cruelty."

Hamblen v. Dugger, 748 F. Supp. 1498, 1504 (M.D. Fla. 1990). The Tafero, Medina, and Davis executions have now established a pattern of impermissible violence and mutilation.[37]

It is clear on the record before this Court that execution by electrocution as carried out in Florida is not limited to "the mere extinguishment of life" as required under Kemmler, for this method of execution entails undue violence and mutilation. This is particularly clear in light of the continuing--and apparently unavoidable--mishaps involving Florida's electric chair. The punishment that is actually meted out by DOC officials differs in kind from the simple sentence of death that the constitution permits and that was recommended by the penalty phase juries and ordered by the courts. Execution by electrocution as

---

[37] See also Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring) ("The fact that I reach this conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions."); Squires v. Dugger, 794 F. Supp. 1568, 1580 (M.D. Fla. 1992) ("Absent a showing establishing a pattern of malfunctions in the operation of the electric chair, the Court cannot conclude that unnecessary pain is being inflicted during executions in the Florida electric chair.").

administered by DOC in Florida violates Kemmler.

B. Electrocution Violates Evolving Standards of Decency

Execution by electrocution as administered in Florida also violates the "evolving standards of decency" criterion for several reasons. First, this practice, which was inaugurated in New York more than a century ago as a humane alternative to hanging, has been abandoned by scores of states and is now the sole method of execution in only three other states.

> Electrocution was first adopted by a state as a method of execution in 1888 and last adopted in 1949, at which time twenty-six states used it; since 1949 (i.e., almost half a century ago), no state has adopted electrocution and twenty states have dropped it; of thirty-eight states that currently authorize execution, only six (Alabama, Florida, Georgia, Kentucky, Nebraska, and Tennessee) require electrocution; of these six, two (Kentucky and Tennessee) have not executed any prisoners since the United States Supreme Court lifted its ban on capital punishment in 1976; four additional states (Arkansas, Ohio, South Carolina, and Virginia) offer electrocution as an option; of these four, one (Ohio) has not executed any prisoners since 1976 . . . .

Jones, 701 So. 2d at 87 (Shaw, J., dissenting).[38]

Second, execution by electrocution is practiced in no other country in the

---

[38] Both Kentucky and Tennessee have recently switched from electrocution to lethal injection as the official method of execution. See Ky. Rev. Stat. Ann. § 431.220 (Mitchie Supp. 1998); Tenn. Code Ann. § 40-23-114 (Supp. 1998).

world:

> [O]f approximately 140 countries outside the United States that impose capital punishment, none impose electrocution; in short, only four governments in the entire world (Alabama, Florida, Georgia, and Nebraska) impose electrocution exclusively . . . .

Id. (emphasis omitted). As a postscript, I note that both the Humane Society of the United States and the American Veterinarian Medical Association condemn electrocution as a method of euthanasia for animals. See id. Third, other less cruel methods of execution are available; lethal injection is readily available (it has already been approved by the Florida Legislature [39]) and is generally considered more humane.[40]

And finally--and most telling--the governmental body charged with oversight of Florida's execution apparatus, the Florida Corrections Commission,[41] has recommended that Florida switch from electrocution to lethal injection. In the wake of the botched executions of Tafero and Medina, the Commission undertook an exhaustive survey of execution methods in other states and reported

---

[39] See § 922.105(1), Fla. Stat. (Supp. 1998) ("If electrocution is held to be unconstitutional . . . all persons sentenced to death for a capital crime shall be executed by lethal injection.").

[40] See supra note 11.

[41] See § 20.315(6), Fla. Stat. (1997).

to the Governor and Legislature:

> We found that almost all states have written procedures regarding the execution process, and that numerous states had recently changed to lethal injection from electrocution because it was considered to be a "more humane method of execution." While the report notes problems encountered in the past with almost all methods of execution, including lethal injection, the Commission recommends that Section 922.10, Florida Statutes, be amended to allow lethal injection as an alternative method of execution, in addition to electrocution, for those persons currently on a sentence of death. Furthermore, for persons whose crimes are committed on or after the effective date of such legislation, lethal injection would be the only method of execution, thereby "phasing out" the use of the electric chair in Florida.
>
> The Florida Corrections Commission believes that Florida has an obligation to ensure that modern technologies keep pace with the level of competence in this area, and, just as changes have occurred in Florida's past in carrying out the death penalty, changes should again occur.

Jones, 701 So. 2d at 82 (Kogan, C.J., dissenting) (emphasis omitted and added). Unfortunately, unlike the New York Legislature a century ago in Kemmler, the Florida Legislature has failed to heed the state's own experts and switch to the more humane method.

VI. SOLE METHOD OF EXECUTION

Section 922.10, Florida Statutes (1997), provides that a death sentence in

Florida shall be carried out by electrocution:

> 922.10 Execution of death sentence; executioner.--A death sentence shall be executed by electrocution. The warden of the state prison shall designated the executioner. . . . The warrant authorizing the execution shall be read to the convicted person immediately before execution.

§ 922.10, Fla. Stat. (1997). The statutory scheme makes no provision for an alternative method of execution, unless electrocution is declared unconstitutional.[42]

Because electrocution is the sole means of execution approved for use at this time in Florida, the constitutional infirmities inherent in this method cannot be avoided by the availability of a more humane alternative:

> Florida's electric chair, by its own track record, has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber of Florida State Prison. Because electrocution is the sole means of execution approved for use in Florida, the legislature has, so to speak, placed all its constitutional eggs in this one basket. As a result, any infirmity in this method cannot be mitigated at this time by the presence of an acceptable alternative. Such an all-or-nothing approach has proved fatal to the capital sentencing scheme in other states.

Jones, 701 So. 2d at 87-88 (Shaw, J., dissenting).

---

[42] See § 922.105, Fla. Stat. (Supp. 1998) ("If electrocution is held to be unconstitutional . . . all persons sentenced to death for a capital crime shall be executed by lethal injection.").

Both the California and Washington legislatures attempted to circumvent this same problem by implementing a death penalty scheme that offered capital defendants a choice in method of execution. California's statutory scheme originally offered a choice in method (lethal gas or injection) but called for the default to fall to lethal gas.[43] After the federal circuit court declared the original scheme unconstitutional under the federal Cruel and Unusual Punishments Clause because lethal gas is impermissibly cruel,[44] the state sought review in the United States Supreme Court. The California legislature promptly amended the statute to allow the default to fall to lethal injection.[45] Based on this legislative action, the United States Supreme Court vacated the circuit court decision and remanded for reconsideration.[46] Subsequently, a different capital defendant elected to be executed by lethal gas and then challenged that method anew. The circuit court reaffirmed its earlier ruling that execution by lethal gas is unconstitutional and

---

[43] See Cal. Penal Code § 3604(b) (West Supp. 1995).

[44] See Fierro v. Gomez, 77 F.3d 301 (9th Cir.1996).

[45] See Cal. Penal Code § 3604(b) (West Supp. 1996).

[46] Gomez v. Fierro, 519 U.S. 918 (1996). See also Fierro v. Terhune, 147 F.3d 1158 (9th Cir. 1998) (holding on remand that because Fiero had not yet chosen to be executed by lethal gas, he lacked standing to challenge the constitutionality of that method of execution and the claim was not ripe for decision). Cf. Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997) (holding that constitutional challenge to execution by lethal gas in Arizona was not ripe for decision because the defendant had not yet chosen that method of execution).

enjoined the execution.[47]

In the State of Washington, the legislature took a similar tack when confronted with an adverse court ruling concerning its official method of execution--death by hanging. The Washington scheme originally had offered a choice (death by hanging or lethal injection), with the default falling to death by hanging.[48] After the federal district court ruled that hanging was unconstitutional if applied to an inmate who was obese,[49] the state appealed. The Washington Legislature promptly amended the statute to allow the default to fall to lethal injection, and the federal circuit court dismissed the appeal as moot.[50]

VII. LETHAL INJECTION

Although electrocution has been the sole method of execution in this state since 1924, the legislature recently passed legislation that does two things: (1) It provides that no sentence of death shall be reduced if a method of execution is declared unconstitutional; and (2) it authorizes the use of lethal injection if electrocution is declared unconstitutional.

---

[47] LaGrand v. Stewart, 173 F.3d 1144 (9th Cir. 1999).

[48] See Wash. Rev. Code 10.95.180(1) (1994).

[49] Rupe v. Wood, 863 F. Supp. 1307 (W.D. Wash. 1994).

[50] See Wash. Rev. Code 10.95.180(1) (1998). See also Rupe v. Wood, 93 F.3d 1434 (9th Cir. 1996) (vacating district court decision in light of subsequent legislative enactment).

Section 775.082(2), Florida Statutes (1997),[51] has been amended to provide that no sentence of death shall be reduced to life if a method of execution is held to be unconstitutional:

> 775.082 Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.--
>
> (1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.
>
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court

---

[51] Prior to being amended, section 775.082, Florida Statutes (1997), provided as follows:

> 775.082 Penalties; mandatory minimum sentences for certain reoffenders previously released from prison.--
>
> (1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.
>
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

§ 775.082, Fla. Stat. (1997).

> shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

§ 775.082 (1)-(2), Fla. Stat. (Supp. 1998) (emphasis added).

Although section 922.10, Florida Statutes (1997) (calling for execution by electrocution),[52] remains unchanged, chapter 922 has been amended to provide that if electrocution is held to be unconstitutional, then all capital defendants shall be executed by lethal injection:

> 922.105 Execution of death sentence by lethal injection if death by electrocution is declared unconstitutional; prohibition against reduction of death sentence as a result of determination that a method of execution is unconstitutional.--
>
> (1) A death sentence shall be executed by electrocution pursuant to s. 922.10. If electrocution is held to be unconstitutional by the Florida Supreme Court under the State Constitution, or held to be unconstitutional by the United States Supreme Court under the United States Constitution, or if the United States Supreme Court declines to review any judgment holding electrocution to be unconstitutional under the

---

[52] Section 922.10, Florida Statutes (1997), provides as follows:

> 922.10 Execution of death sentence; executioner.--A death sentence shall be executed by electrocution. The warden of the state prison shall designated the executioner. . . . The warrant authorizing the execution shall be read to the convicted person immediately before execution.

§ 922.10, Fla. Stat. (1997).

United States Constitution made by the Florida Supreme Court or the United States Court of Appeals that has jurisdiction over Florida, all persons sentenced to death for a capital crime shall be executed by lethal injection.

(2) The provisions of the opinion and all points of law decided by the United States Supreme Court in Malloy v. South Carolina, 237 U.S. 180 (1915), finding that the Ex Post Facto Clause of the United states Constitution is not violated by a legislatively enacted change in the method of execution for a sentence of death validly imposed for previously committed capital murders, are adopted by the Legislature as the law of this state.

(3) A change in the method of execution does not increase the punishment or modify the penalty of death for capital murder. Any legislative change to the method of execution for the crime of capital murder does not violate s. 10, Art. I or s. 9, Art X of the State Constitution.

. . . .

(6) Notwithstanding s. 775.082(2), s. 775.15(1)(a), or s. 790.161(4), or any other provision to the contrary, no sentence of death shall be reduced as a result of a determination that a method of execution is declared unconstitutional under the State Constitution or the Constitution of the United States. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.

§ 922.105, Fla. Stat. (Supp. 1998) (emphasis added).

The question posed in the present case is whether retroactive application of these statutory changes violates ex post facto principles. I conclude that it does

not, based on Malloy v. South Carolina, 237 U.S. 180 (1915). There, South Carolina sought to apply its newly enacted method of execution, electrocution, to a defendant whose crime had been committed before the effective date of the new statute. The statute in effect at the time of the crime had called for death by hanging. The United States Supreme Court held that retroactive application of the more humane method of execution did not violate ex post facto concerns. I would apply Malloy to the present case and allow Provenzano's sentence to be carried out by lethal injection.[53]

VIII. CONCLUSION

Execution by electrocution--with its attendant smoke and flames and blood

---

[53] I would recede from Washington v. Dowling, 109 So. 588 (Fla. 1926), to the extent that it is inconsistent with this conclusion. There, the statute that was in effect at the time of the crime called for death by hanging, and the sentence imposed by the trial court specified death by hanging. Before Washington was executed, however, the Legislature enacted a law abolishing hanging and calling for death by electrocution. The Governor issued a warrant ordering that Washington be electrocuted. The trial court ruled the warrant void because it differed from the sentence imposed by the court. The Governor then issued a new warrant ordering death by hanging. Washington petitioned the trial court, claiming that he could not be hung because the new law had abolished hanging. The trial court rejected the claim. This Court affirmed. The Court reasoned that (1) the trial court's sentence calling for death by hanging was final and could not be changed, and (2) the portion of the new law abolishing hanging could not operate to allow Washington to evade the court-ordered punishment. The Court relied on the Savings Clause of article 3, section 32, Florida Constitution (1885), which provided that "the repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment." I would recede from that portion of Washington wherein the Court held that the sentence could not be carried out by electrocution. The Savings Clause thus would be inapplicable. See, e.g., State v. Watts, 558 So. 2d 994 (Fla. 1990) (explaining that the purpose of the Savings Clause is prevent a defendant from evading punishment).

and screams--is a spectacle whose time has passed. The fiery deaths of Jesse Tafero and Pedro Medina and the recent bloody execution of Allen Lee Davis are acts more befitting a violent murderer than a civilized state. The color photos of Davis depict a man who--for all appearances--was brutally tortured to death by the citizens of Florida. Violence begets violence, and each of these deaths was a barbaric spectacle played by the State of Florida on the world stage. Each botched execution cast the entire criminal justice system of this state--including the courts--in ignominy.

The United States Constitution stands before the world not as a dark testament to wanton, state-sponsored violence and mutilation, but rather--in the spirit of the founding fathers--as an enduring beacon of light and hope and justice. The United States Supreme Court has ruled that a principal purpose of the Cruel and Unusual Punishments Clause is

> to protect the dignity of society itself from the barbarity of exacting mindless vengeance.

Ford v. Wainwright, 477 U.S. 399, 410 (1986). Our Constitution--this nation's sacred charter--abides as a paragon of all that is good and decent in the law, a shining example for the world to follow.

Only three other states in the union--Alabama, Georgia and Nebraska--

continue to follow Florida's lead in requiring electrocution as the sole means of execution. Scores of states have abandoned this practice. No other country in the world uses electrocution as a means of execution. The State's own preeminent experts in this field--i.e., DOC's advisory committee--have recommended that Florida forsake this outdated practice in favor of lethal injection. There comes a time when the Constitution must say "enough is enough."

I would direct that the sentence in the present case be carried out by lethal injection as prescribed by statute.

ANSTEAD, J., concurs.

(POST-EXECUTION PHOTOS OF ALLEN LEE DAVIS ARE APPENDED TO THIS DISSENTING OPINION OF SHAW, J.)

ANSTEAD, J., dissenting.

I concur in the scholarly opinions of Justice Shaw and Justice Pariente. I also commend the opinion of Chief Justice Harding which, while contrary to my own on the constitutional issues in question, makes out a compelling case for abandoning electrocution as a method of enforcing the death penalty.

The views of the Chief Justice, Justice Shaw, and Justice Pariente are deeply rooted in the jurisprudence of the U.S. Supreme Court and of this Court. Perhaps no jurist has more eloquently made the same point than our own Justice Ervin in his dissenting opinion in this Court's landmark case of State v. Dixon:

> The nation's highest court recognizes we have come a long way from the rack, the "drawing and quartering," the headsman's axe, the public executions, the "hanging judge"–from cruel and unusual punishments. We can little afford to turn back because it is clear to thinking people that brutality and cruelty at the hands of government soils the fabric of an enlightened nation. Governments are constantly under scrutiny–constantly gauged by a nation's thinking people in terms of whether they are enlightened and humane; of whether they are still instruments of oppression, perpetuators of archaic punishments to allay the fears and passions of privileged groups.

State v. Dixon, 283 So. 2d 1, 23 (Fla. 1973) (Ervin, J., dissenting). Justice Ervin's words seem perfectly suited to today's debate on whether the continuing use of the electric chair constitutes cruel or unusual punishment. His words also strike a

chilling chord today because we are presented with a record and graphic evidence, including photographs, of the horror of Florida's most recent use of the electric chair.

CRUEL OR UNUSUAL

An obvious failing of the majority opinion is its apparent unwillingness to directly confront and explain the Florida Constitution's prohibition of cruel or unusual punishments and the ban of cruel and unusual punishments in the U.S. Constitution.[54] If the majority did so it would surely have to conclude that at the very least punishing someone by the direct application of lethal doses of electricity to various parts of the body is a highly unusual method of punishment, whether considered years ago when our constitutions were approved, or considered today. In fact, the United States Supreme Court has quoted with approval an opinion of the New York Court of Appeals characterizing

---

[54]The resolution of these issues should also serve as an apt reminder that the responsibility of our courts does not end with the mere mechanical processing of cases. We must directly confront the important and sensitive issues that are presented to us. And, of course, there is no greater responsibility assigned to us than to see that the criminal justice process is carried out in accord with the provisions of the Florida and United States Constitutions. It is the exercise of that responsibility that is made visible in the various opinions of the justices of this Court in this case, and it is the diligent exercise of that responsibility that defines the very essence of the role of this Court in the scheme of Florida's constitutional government. We cannot shirk that responsibility because it arises in the context of outrageous criminal conduct involving totally blameless victims. While those extreme circumstances form the backdrop for the issues we confront and may give rise to the most passionate of emotional reactions, it is peculiarly and importantly within the charge of the justice system to be certain that we resolve these important issues without resort to the distorting influences of passion and emotion.

electrocution as "certainly unusual". In re Kemmler, 136 U.S. 436, 443-44 (1890). Electrocution is simply not a "usual" form of punishment, and it cannot somehow be made "usual" by its continued use. If we were to allow an "unusual" punishment to become "usual" simply by its repeated usage then we simply would be editing out the ban on unusual punishments in the Florida Constitution.

Determining whether electrocution is a cruel punishment requires more analysis. Arguably, for example, electrocution may not have been considered cruel when it was first introduced in the nineteenth century, because it was then compared to death by hanging and considered more humane than hanging. In fact, the U.S. Supreme Court expressly relied upon findings that electrocution would be more humane than hanging in refusing to interfere with New York's decision to abandon hanging (as a barbaric practice from the dark ages) in favor of the more humane electrocution. In re Kemmler. Based on the prevailing culture and knowledge at the time, and the urgency to do away with hanging, it is easy to understand why electrocution may not have been considered constitutionally cruel. However, just as electrocution may have been originally evaluated in comparison with hanging, we know today that the overwhelming majority of death penalty jurisdictions have long since rejected use of the electric chair and have turned to lethal injection as a more humane punishment.

As noted above, In re Kemmler was decided in the context of a state's attempt to find a more humane means of death than hanging. However, it is also important to note that the case was decided before electrocution had actually been used. Because we know that lethal injection provides a more humane alternative, and, because we now know from actual experience that electrocution always involves mutilation (within and without the body) and a substantial risk of malfunction (including external burning, bleeding, asphyxiation, etc.), as well as a culture of cruelty ("burn 'em", "fry 'em"), it is apparent that electrocution has become a cruel and senseless punishment, especially when evaluated in light of our evolving standards of decency. Hopefully, just as those who reflected back on the history of hanging at the close of the nineteenth century and concluded it was inhumane, we now, at the close of the twentieth century, have an even more informed and enlightened view of acceptable punishments upon which to evaluate death by electrocution.

In Justice Shaw's opinion he again notes that for humane reasons we as a society have rejected the use of electrocution even for the killing of animals. That simple but eloquent observation perhaps speaks more directly to the heart of the issue before us than any other argument. In effect, we have found the killing of animals by electrocution to be inhumane and uncivilized. We know, as the

State has candidly conceded, that the entire process of death by electrocution is at least "somewhat ghastly". We also know, as aptly explained by Chief Justice Harding, that a more humane means of taking life is readily available to the State. Under those circumstances, our continuing embrace of a savage and inhumane means of taking life does a disservice to our justice system and our society.[55]

SHAW, J., concurs.

PARIENTE, J. dissenting

I write to explain the reasons I am compelled to dissent in this case. The subject of the debate presented by this case is not whether the death penalty is a constitutionally permissible punishment for those in this State who commit the most aggravated and least mitigated crimes, such as Allen Lee Davis and Thomas

---

[55]Indeed, it cannot be gainsaid that our justice system is not simply an instrument of vengeance, despite the connotations to that effect contained in the extreme rhetoric that sometimes surrounds the constitutional debate over the continuing use of the electric chair. Unfortunately, the constitutional debate over whether killing a condemned murderer by electrocution constitutes cruel or unusual punishment is recklessly cast by some in terms of a failure of society and the justice system to consider the fate of the innocent victims of the condemned defendant's crimes. That suggestion misperceives the essential role of the justice system, distorts the constitutional debate, and factually misses the mark. Of course, in addition, nothing could be further from reality. The reality is that our society so values human life that we reserve our harshest criminal penalties for violent acts that threaten or take an innocent human life. So, it can hardly be said that the taking of an innocent life is ignored by society or its justice system. But it must never be said that the American justice system has refused to properly confront the issues that it has been given the unique responsibility to decide or, worse yet, that the justice system has allowed itself to become a means for extracting vengeance. We have too often seen the failure of societies whose court systems operate in such ways.

Provenzano. Thus, this case does not have to do with the legislative prerogative to specify the punishment for the crime--whether it be death, life in prison, or a sentence of a definite number of years in prison.

Rather, the subject of the legal debate before this Court solely concerns the scope of the legislative prerogative to select one method of execution over another. Thus, the issue in this case is not whether Provenzano should be executed; only how he should be executed.[56] It is without question that the legislative prerogative to choose a given method of execution must be judged by the prohibition against the infliction of cruel and unusual punishment found in the Florida and federal constitutions. See U.S. Const., amend. VIII; art. I, § 17, Fla. Const.

As the United States Supreme Court stated in Wilkerson v. Utah, 99 U.S. 130, 133 (1878), although the legislative branch may define crimes and "prescribe the punishment of the offenders," this power is "subject to the prohibition of the Constitution that cruel and unusual punishments shall not be inflicted." (Emphasis supplied.) Almost one hundred years later, this principle was

---

[56]Last year when I joined the Court, I joined with Chief Justice Harding in urging the Legislature to switch to lethal injection. However, our Legislature, while providing for lethal injection if electrocution is declared unconstitutional, has elected to retain electrocution as its sole method of execution. This leaves the Court with no choice but to fulfill our obligation to examine the constitutional question.

reiterated: "It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not." Gregg v. Georgia, 428 U.S. 153, 174 (1976) (quoting Furman v. Georgia, 408 U.S. 238, 313-14 (1972) (White, J., concurring).[57]

"[T]he Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability" of a challenged punishment, guided by "objective factors to the maximum possible extent." Coker v. Georgia, 433 U.S. 584, 592, 597 (1977) (plurality opinion). Thus, the Court must exercise its own judgment as to whether a method of execution is cruel and unusual in order to enforce the requirement of the Eighth Amendment

---

[57] See also Furman v. Georgia, 408 U.S. 238, 263-68 (1972) (per curiam) (Brennan, J., concurring) (citations omitted):

> [The Framers] included in the Bill of Rights a prohibition upon "cruel and unusual punishments" precisely because the legislature would otherwise have had unfettered power to prescribe punishments for crimes . . . .
>
> . . . Accordingly, the responsibility lies with the courts to make certain that the prohibition of the Clause is enforced . . . .
>
> . . . The right to be free from of cruel and unusual punishments, like the other guarantees of the Bill of Rights, "may not be submitted to vote; (it) depend(s) on the outcome of no elections." "The very purpose of a Bill of Rights was to withdraw certain subjects from vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."
>
> Judicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes.

that cruel and unusual punishment not be inflicted.

To determine whether electrocution constitutes cruel and unusual punishment, we must first consider what the United States Supreme Court has considered to be the purpose and scope of the Eighth Amendment's prohibition against cruel and unusual punishment. As explained in Trop v.Dulles, 356 U.S. 86, 101 (1958), the Eighth Amendment must draw its "meaning from the evolving standards of decency that mark the progress of a maturing society."

Perhaps the most concise discussion of the scope of the Eighth Amendment is set forth in Estelle v. Gamble, 429 U.S. 97 (1976):

> It suffices to note that the primary concern of the drafters [of the Eighth Amendment] was to proscribe "torture(s)" and other "barbar(ous)" methods of punishment. Accordingly, this Court first applied the Eighth Amendment by comparing challenged methods of execution to concededly inhuman techniques of punishment . . . .
>
> Our more recent cases, however, have held that the Amendment proscribes more than physically barbarous punishments. The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ," against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society" or which "involve the unnecessary and wanton infliction of pain."

Id. at 102 (citations omitted) (emphasis supplied). This clause has an "expansive and vital character." Glass v. Louisiana, 471 U.S. 1080, 1083 (1985) (Brennan,

J., dissenting from denial of certiorari) (quoting Weems v. United States 217 U.S. 349, 377 (1910)). "[T]he Amendment has been interpreted in a flexible and dynamic manner." Gregg, 428 U.S. at 171. As concepts of civility and dignity evolve, so do the limits of what constitutes cruel and unusual punishment. See Dulles, 356 U.S. at 100. Accordingly, Eighth Amendment issues must be evaluated "in light of contemporary human knowledge," Robinson v. California, 370 U.S. 660, 666 (1962), rather than "in reliance on century-old factual premises that may no longer be accurate." Glass, 471 U.S. at 1083 (Brennan, J., dissenting from denial of certiorari). These broad statements of constitutional principles apply with equal force to determine the legality of a method of execution. See Campbell v. Wood, 511 U.S. 1119, 1121 (1994) (Blackmun, J., dissenting from denial of certiorari) (explaining that the United States Supreme Court has never "distinguished between challenges to the proportionality and method of capital punishment").

In holding that the absence of conscious pain after the electrical current is administered ends the judicial inquiry into whether electrocution is unconstitutional, the majority decision in this case relies on our opinion in Jones v. State, 701 So. 2d 76, 79 (Fla. 1997), cert. denied, 118 S. Ct. 1297 (1998). Jones in turn cites to Gregg v. Georgia, 428 U.S. 153 (1976), Louisiana ex. rel

Francis v. Resweber, 329 U.S. 459 (1947), and Campbell v. Wood, 18 F.3d 662 (9th Cir. 1994). However, no such narrow and conclusive statement can be derived from those cases.

The fact that the method of execution may result in instantaneous death, while an important factor to consider, does not end the judicial inquiry into whether the method of punishment is cruel and unusual. Analyzing the constitutionality of punishment under the Eighth Amendment, the Supreme Court in Gregg also stated that a "penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" 428 U.S. at 173 (quoting Dulles, 356 U.S. at 100).

Further, the Campbell decision relied on the following statement in Glass:

> What are the objective factors by which courts should evaluate the constitutionality of a challenged method of punishment? First and foremost, the Eighth Amendment prohibits "the unnecessary and wanton infliction of pain." Gregg v. Georgia, supra, at 173, (opinion of Stewart, Powell, and Stevens, JJ.). See also Coker v. Georgia, supra, at 592, (plurality opinion) (a punishment is excessive if it is "nothing more than the purposeless and needless imposition of pain and suffering"); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463, (1947) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence"). The Court has never accepted the proposition that notions of deterrence or retribution might legitimately be served through the infliction of pain beyond that which is minimally necessary to terminate an individual's life.

Glass, 471 U.S. at 1084 (Brennan, J., dissenting from denial of certiorari) (emphasis supplied), cited in Campbell, 18 F.3d at 682. However, Campbell failed to cite to the remainder of Justice Brennan's explanation in Glass that the contours of the Eighth Amendment extend beyond whether there is conscious pain inherent in the method of execution:

> The Eighth Amendment's protection of "the dignity of man," Trop v. Dulles, supra, at 100, (plurality opinion), extends beyond prohibiting the unnecessary infliction of pain when extinguishing life. Civilized standards, for example, require a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. See, e.g., Royal Commission on Capital Punishment, 1949-1953 Report ¶ 732, p. 255 (1953) (hereinafter Royal Commission Report). Similarly, basic notions of human dignity command that the State minimize "mutilation" and "distortion" of the condemned prisoner's body. Ibid. These principles explain the Eighth Amendment's prohibition of such barbaric practices as drawing and quartering. See, e.g., Wilkerson v. Utah, supra, at 135.

Glass, 471 U.S. at 1085 (Brennan, J., dissenting from denial of certiorari). Thus, the Eighth Amendment also requires that the method of execution minimize physical violence as well as mutilation and distortion of the human body.

Therefore, my conclusion differs from the majority because I fail to see how United States Supreme Court precedent allows us to limit our constitutional inquiry to the presence or absence of conscious pain. Even the concurring

opinion of Justice Quince recognizes that the "real question" is whether electrocution violates the "evolving standards of decency." Concurring opinion of Quince, J., at 17. In apparent recognition that the constitutional inquiry is not so limited, the State conceded in oral argument that the guillotine would not pass constitutional muster today, even though it most likely results in an instantaneous death without the defendant suffering conscious pain.

No one seriously disagrees that as of the end of the twentieth century, lethal injection is a more humane method of execution and creates far less a spectacle than electrocution. It is less physically violent and minimizes mutilation of the body. No one seriously disagrees that electrocution was originally selected by the State of New York in 1885 in lieu of hanging because at that time the executive and legislative branches affirmatively determined that electrocution was the "most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." In re Kemmler, 136 U.S. 436, 444 (1890). There is no indication that the legislative decision in 1999 to retain electrocution, contrary to the recommendations of the Florida Corrections Commission, was based on objective evidence that this method was more

humane than lethal injection or other alternative methods.[58]

The Legislature does not have the prerogative to select a method of execution that is inherently cruel, violent and mutilating when more humane methods exist. The State's only legitimate interest is in the extinguishment of life. Indeed, the State has not made the argument in this case that the Legislature has the "right" to make the execution more violent and more cruel than necessary to extinguish the lives of those sentenced to death.

In determining whether electrocution comports with "evolving standards of decency," we should consider the fact the Florida Corrections Commission recommended that the electric chair be phased out as a method of execution in favor of lethal injection because it "believes that Florida has an obligation to ensure that modern technologies keep pace with the level of competence in this area, and, just as changes have occurred in Florida's past in carrying out the death penalty, changes should again occur." Jones, 701 So. 2d at 82 (Kogan, C.J., dissenting) (quoting Florida Corrections Comm'n, Supplemental Report on Execution Methods Used by States (1997)).

We cannot ignore the objective evidence that almost every state that

---

[58]In fact, it appears the prime concern of the Legislature was that the death sentences not be invalidated as a result of a change in the method of execution. As Justice Harding's concurring opinion and Justice Shaw's dissent explain, the change to lethal injection would not result in any death sentence being vacated.

authorizes the death penalty has either selected or changed its method to lethal injection--some in response to the botched executions of Medina and Tafero. While the fact that only three other states (Georgia, Alabama, and Nebraska[59]) retain electrocution as the sole method of execution is not determinative of the constitutional question, this fact bears on the exercise of the Court's judgment as to whether the method of punishment violates contemporary standards of decency. See Gregg, 428 U.S. at 172-76.

In addition, we must look at the actual experience in recent years with the electric chair. Recent executions have revealed one problem after another.[60] Flames spewed from the heads of Medina and Tafero. See Jones, 702 So. 2d at 85-86. The cause was found to be an improper sponge. See id. at 86. After two flaming executions, the sponges were replaced and the flames ceased. However, it is undisputed that despite all of the best efforts, electrocution will result in burning of parts of the body. In fact, all of the inmates in the last executions have

---

[59]In Nebraska, legislation has been proposed that would change the method of execution from electrocution to lethal injection. See LB 52, 96th Leg., 1st Spec. Sess. (Neb. 1999).

[60]I agree that the Department of Corrections (DOC) appears to be attempting in good faith to correct recurrent problems that have turned a series of executions over the last few years into something of a freak show. In fact, it is precisely because these problems continue to occur, despite the best efforts of DOC, that the electric chair is not only unconstitutional as applied in Florida, but per se unconstitutional as a cruel and unusual punishment incompatible with evolving standards of decency.

sustained outward burns to their bodies. Thus, burning is inherent in the method of the execution.

It is undisputed that, despite all best efforts, inmates have been observed breathing after the electric current has ceased. This indicates that brain stem activity has continued even after the application of electrical current. Now with the last execution, there is a serious question as to whether the mouth piece partially asphyxiated Davis, which resulted in bloody side show--a spectacle more befitting of a "B" Hollywood horror movie than a state-sanctioned execution.

Although a factual finding has been made by two different circuit court judges that Florida's electric chair causes no conscious pain, these factual findings need only be made by a preponderance of the evidence. Despite our deferential standard of review to trial court's factual findings, the expert testimony submitted by Provenzano and the witness accounts of survival after electrocution raise serious questions that judicial electrocution does in fact involve conscious pain and suffering. See generally Glass, 471 U.S. at 1086-87 (Brennan, J., dissenting from denial of certiorari) ("There is considerable empirical evidence and eyewitness testimony . . . [that] suggests that death by electrical current is extremely violent and inflicts pain and indignities far beyond the 'mere extinguishment of life.'"). We cannot simply ignore this evidence.

As Justice Brennan observed. "[I]t is firmly within the 'historic process of constitutional adjudication' for courts to consider, through a 'discriminating evaluation' of all available evidence, whether a particular means of carrying out the death penalty is 'barbaric' and unnecessary in light of currently available alternatives." Id. at 1084 (quoting Furman, 408 U.S. at 420 (Powell, J., dissenting)) (emphasis supplied).[61] All of this leads to the conclusion that this method of execution does not comport with "evolving standards of decency," Trop, 356 U.S. at 101, based on an evaluation of "objective factors." Coker, 433 U.S. at 592.

"The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." Resweber, 329 U.S. at 464 (emphasis supplied). Certainly, knowledge of death involves fear, which is inevitable with all impending executions. However, all of the other troubling aspects of recent electrocutions--the flames, the blood, the screams, the burning, and the resulting spectacle of the actual execution--indicate to me that there is cruelty, violence and mutilation inherent in this method of execution.

---

[61] Justice Powell's views in Furman v. Georgia, 408 U.S. 238 (1976), were largely adopted by the Supreme Court as the analysis to be used in Eighth Amendment claims in Gregg v. Georgia, 428 U.S. 153 (1976).

In enacting the Eighth Amendment, the founders of this Nation determined that, as a civilized nation, we would not allow the State to become the instrument of cruelty and violence in the methods chosen to punish those who violated the law. This enduring constitutional principle applies no matter how great our desire as individuals for vengeance and no matter how cruel, how ghastly, or how violently the innocent victims died.

We do not have to wait another fifty years to determine that in 1999, electrocution is not only unusual, since only three states including Florida currently execute its death-sentenced offenders solely by electrocution, but it is also inherently cruel as involving mutilation and violence. Electrocution, as a method of carrying out the State's legitimate interest in imposing the ultimate penalty of death, has become incompatible with the concepts of "dignity, civilized standards, humanity, and decency" that embody the essence of the Eighth Amendment. Estelle, 429 U.S. at 102. History and this Court's recent experience with the electric chair all point to this inevitable conclusion. Just as the guillotine, public hanging and death by firing squad would be deemed barbaric relics of another era, so must electrocution be declared unconstitutional as violative of the Eighth Amendment's clear prohibition that cruel and unusual punishment not be inflicted.

ANSTEAD, J., concurs.

NO MOTION FOR REHEARING WILL BE ALLOWED.

Original Proceeding - Habeas Corpus

Michael P. Reiter, Chief Assistant CCRC, and Mark S. Gruber, Assistant CCRC, Capital Collateral Regional Counsel - Middle Region, Tampa, Florida; and Martin J. McClain, Special Assistant CCRC, Brooklyn, New York,

for Petitioner

Robert A. Butterworth, Attorney General, Richard B. Martell, Chief, Capital Appeals, and Carolyn M. Snurkowski, Assistant Deputy Attorney General, Tallahassee, Florida, Katherine V. Blanco and Carol M. Dittmar, Assistant Attorneys General, Tampa, Florida; and Louis A. Vargas, General Counsel and Susan A. Maher, Deputy General Counsel, Department of Corrections, Tallahassee, Florida,

for Respondent

DEC 15 1999

(2)

No. 99-6723

Supreme Court, U.S.
FILED
DEC 15 1999
CLERK

In The

Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

v.

MICHAEL MOORE, Secretary,
Florida Department of Corrections,

Respondent.

On Writ Of Certiorari To The Florida Supreme Court

BRIEF FOR PETITIONER

GREGORY C. SMITH, ESQ.*
ANDREW THOMAS, ESQ.
Capital Collateral Counsel
Northern Region
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(850) 488-7200

MARTIN MCCLAIN, ESQ.
GAIL ANDERSON, ESQ.
Special Assistant CCRC-N

Counsel for Petitioner
** Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

60pp

CAPITAL CASE
QUESTIONS PRESENTED

1. Did the Florida Supreme Court's appraisal of the likelihood that Mr. Bryan will suffer needless agony and degradation when he is put to death by Florida's electric chair violate the Eighth Amendment by disregarding a constitutionally unacceptable risk of physical violence, disfigurement and torment?

2. Did the Florida Supreme Court err in concluding that the record as a whole insufficiently sustains Mr. Bryan's contention that his execution by Florida's electric chair unnecessarily exposes him to physical suffering and degradation in violation of the Eighth Amendment?

3. Following the documented, repeated malfunctioning of Florida's electric chair, resulting in ghastly spectacles of violent disfigurement, did the Florida Supreme Court err in rejecting Mr. Bryan's contention that his being subjected to execution by such means constitutes wanton psychological and moral cruelty that violates the Eighth Amendment?

4. Did the Florida Supreme Court err in determining that the presence or absence of conscious pain once electrocution begins is the only factor which determines whether or not Florida's electric chair constitutes cruel and unusual punishment under the Eighth Amendment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

BRIEF FOR PETITIONER 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. THE SERIES OF EVENTS GIVING RISE TO THESE PROCEEDINGS 2

B. THE PRACTICE OF ELECTROCUTION AS A METHOD OF EXECUTION 10

C. VIOLENCE, MUTILATION AND PHYSICAL INDIGNITY 11

D. THE RISK OF CONSCIOUS PAIN DURING ELECTROCUTION 13

1. Background data and scientific principles ... 16

a. The effects of electrical trauma on consciousness 16

b. The amount of current reaching the brain 17

2. The debate over whether judicial electrocution produces instant unconsciousness, precluding conscious pain 18

a. The condemned inmates' witnesses ... 18

b. The State's witnesses 22

TABLE OF CONTENTS – Continued

Page

E. PRE-ELECTROCUTION PAIN 24

1. How the mouth strap is designed and affixed 25

2. The risk of pain from the mouth strap ... 28

SUMMARY OF THE ARGUMENT 31

ARGUMENT 32

A. INTRODUCTION: THE GOVERNING EIGHTH AMENDMENT STANDARDS 32

B. THE FLORIDA SUPREME COURT HAS DISREGARDED PROPER EIGHTH AMENDMENT ANALYSIS AND AN INTOLERABLE RISK OF PHYSICAL PAIN 36

C. THE FLORIDA SUPREME COURT HAS DISREGARDED ITS OBLIGATION TO CONSIDER THE PSYCHOLOGICAL TORMENT, INDIGNITY AND BARBARIC DISFIGUREMENT INFLICTED BY ITS ELECTROCUTION PROCEDURE 41

1. Florida's procedure involves exquisite mental cruelty 41

2. Florida's procedure adds the horror of uncertainty 44

3. The prospect of disfigurement enhances the atrocity 46

4. Florida's method of electrocution is an atavistic barbarism 49

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Beck v. Alabama, 447 U.S. 625 (1980) 35

Bryan v. Moore, 120 S.Ct. 394 (1999) 1

Buenoano v. State, 565 So. 2d 309 (Fla. 1990) 3, 4, 47

Coker v. Georgia, 433 U.S. 584 (1977) 35

Enmund v. Florida, 458 U.S. 782 (1982) 35

Estelle v. Gamble, 429 U.S. 97 (1976) 32, 34

Farmer v. Brennan, 511 U.S. 825 (1994) 36, 40

Ford v. Wainwright, 477 U.S. 399 (1986) 35, 44

Furman v. Georgia, 408 U.S. 238 (1972) 34, 35

Gregg v. Georgia, 428 U.S. 153 (1976) 32, 34, 35

Haynes v. Washington, 373 U.S. 503 (1963) 39

Helling v. McKinney, 509 U.S. 25 (1993) 36, 37

Hudson v. McMillian, 503 U.S. 1 (1992) 33

Hutto v. Finney, 437 U.S. 678 (1978) 34

In re Kemmler, 136 U.S. 436 (1890) 40, 49

In re Medley, 134 U.S. 160 (1890) 33, 46

Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) 34

Jones v. Butterworth, 691 So. 2d 481 (Fla. 1997) ... 5, 6, 9

Jones v. Butterworth, 695 So. 2d 679 (Fla. 1997) ... 2, 6, 9

Jones v. State, 701 So. 2d 76 (Fla. 1997) 2, 3, 6, 7, 9, 38

Lewis v. Jeffers, 497 U.S. 764 (1990) 36

Lockett v. Ohio, 438 U.S. 586 (1978) 35, 39

TABLE OF AUTHORITIES – Continued

Page

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947) 40

Maynard v. Cartwright, 486 U.S. 356 (1988)..... 36

Penry v. Lynaugh, 492 U.S. 302 (1989)..... 35

Poyner v. Murray, 508 U.S. 931 (1993) 34

Provenzano v. Moore, 737 So. 2d 551 (Fla. 1999) 7

Provenzano v. Moore, 1999 WL 756012 (Fla. Sept. 24, 1999)..... *passim*

Rhodes v. Chapman, 452 U.S. 337 (1981)..... 32

Robinson v. California, 370 U.S. 660 (1962).....34, 40

Sochor v. Florida, 504 U.S. 527 (1992) 39

Stanford v. Kentucky, 492 U.S. 361 (1989).....33, 34, 35

Stansbury v. California, 511 U.S. 318 (1994)..... 39

Thompson v. Oklahoma, 487 U.S. 815 (1988)..... 35

Trop v. Dulles, 356 U.S. 86 (1958).....33, 34, 35

Weems v. United States, 217 U.S. 349 (1910) 32, 33, 34, 48, 49

Wilkerson v. Utah, 99 U.S. 130 (1879) 48

MISCELLANEOUS

C. Abengozar, B. Bueno & J. Vega, *Intervention on Attitudes toward Death along the Life Span*, 25 EDUCATIONAL GERONTOLOGY 435 (1999) 45

J. Arndt, J. Greenberg, S. Solomon, T. Pyszczynski & L. Simon, *Suppression, Accessibility of Death-Related Thoughts, and Cultural Worldview Defense: Exploring the Psychodynamics of Terror Management*, 73 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 5 (1997) 42

TABLE OF AUTHORITIES – Continued

Page

M. Basoglu & S. Mineka, "The Role of Uncontrollable and Unpredictable Stress in Post-traumatic Stress Responses in Torture Survivors" in TORTURE AND ITS CONSEQUENCES: CURRENT TREATMENT APPROACHES, 182-225 (Cambridge University Press 1992) 45

E. Becker, *The Denial of Death*, 11-12 (Free Press paperback ed. 1997) 43

E. Bendann, DEATH CUSTOMS 45-56, 83-89 (Knopf 1930) 48

Jeffrey Brainard, *Faulty Execution Renews Debate: Governor Orders an Investigation Into What Went Wrong With the Chair After Flames Erupt From the Inmate*, St. Petersburg Times, March 26, 1997 5

C. Brandon, *The Electric Chair: An Unnatural American History*, 205 (McFarland Publishers 1999) ..46, 47

D. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WILLIAMS AND MARY L. REV. 551 (1994) 40

R. Durham, *The Cruel and Unusual Punishment and Excessive Fines Clauses*, 26 AM. CRIM. L. REV. 1617 (1989) 32

R. J. Evans, RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY 1600-1987 (Oxford University Press 1996) 32

V. Florian & M. Mikulincer, *Fear of Death and the Judgment of Social Transgressions: A Multidimensional Test of Terror Management Theory*, 73 *Journal of Personality and Social Psychology* 369 (1997) 45

TABLE OF AUTHORITIES – Continued

Page

W. Fordyce, *Pain and Suffering: A Reappraisal*, 43 AMER. PSYCHOLOGIST, 276 (1988) 42

Michael Foucault, *Discipline and Punish*, 14 (Alan Sheridan trans., Vintage Books 2d ed. 1995)....32, 49

A. Granucci, *"Nor Cruel and Unusual Punishments Inflicted: The Original Meaning"*, 57 CAL. L. REV. 839 (1969) 32

Grisly Execution in Electric Chair Sickens Witnesses, Flames Shoot from Convict's Head as Florida Murderer is Put to Death, San Jose Mercury News 1A (March 26, 1997) 47

Jackie Halifax, *Execution Method Debated: Legislators Defend Electrocution*, Fla. Times-Union, March 27, 1997 5

C. Haney, *Psychological Secrecy and the Death Penalty: Observations on "The Mere Extinguishment of Life,"* 16 STUDIES IN LAW, POLITICS AND SOCIETY 3 (1996) 43

John S. Herbrand, *Validity, Construction, and Application of Statutes Making It A Criminal Offense to Mistreat or Wrongfully Dispose of Dead Body*, 81 A.L.R. 3d 1071 (1977)..... 48

L. Hoffman, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 TEXAS L. REV. 1039 (1992) 44

William Hogarth, *The Four Stages of Cruelty*, 1751 47

Franz Kafka, *In the Penal Colony* 41

A. Koestler, *Darkness at Noon* (Macmillan 1941)..... 45

E. Kubler-Ross, *On Death and Dying* (Macmillan 1969)..... 42

TABLE OF AUTHORITIES – Continued

Page

E. Kubler-Ross, *The Languages of Dying Patients*, 10 HUMANITAS 5 (1974) 42

J. Lieberman, *Terror Management, Illusory Correlation, and Perceptions of Minority Groups*, 21 BASIC AND APPLIED SOCIAL PSYCHOLOGY 13 (1999) 45

R. Neimeyer, ed., *Death Anxiety Handbook: Research, Instrumentation, and Application* (Taylor and Francis 1994) 45

New York Herald, August 10, 1884 ..... 46, 47

M. Patarelli & J. Bishop, *Perceptions of Estimated Pain Experienced During Execution: Effects of Gender and Belief in Capital Punishment*, 38 OMEGA: JOUNRAL OF DEATH AND DYING, 103 (1998-99) 47

A. Ploughaus, I. Tracey, S. Clare, *et al.*, *Dissociating Pain from its Anticipation in the Human Brain*, 284 SCIENCE (No. 5422) 1979 (1999) 42

T. Pyszczynski, J. Greenberg & S. Solomon, *A Dual Process Model of Defense Against Conscious and Unconscious Death-Related Thoughts: An Extension of Terror Management Theory*, 106 PSYCHOLOGICAL REVIEW 835 (1999) 42

T. Pyszczynski, J. Greenberg, & S. Solomon, *"A Terror Management Perspective on the Psychology of Control: Controlling the Uncontrollable"* in M. Kofta, G. Weary, *et al.*, eds., PERSONAL CONTROL IN ACTION: COGNITIVE AND MOTIVATIONAL MECHANISMS 85-108 (Plenum Press 1998) 45

David Sapsted, *Electric Chair Sparks Another Grisly Scene*, Irish Independent 28 (July 9, 1999) 47

Robert Louis Stevenson, *The Body Snatcher* 48

TABLE OF AUTHORITIES – Continued

Page

Supplemental Report: Execution Methods Used By States 10

Peter Wallsten, *Medina Felt No Pain, Say Doctors,* St. Petersburg Times, April 1, 1997 5

Marina Warner, *No Go The Bogeyman: Scaring, Lulling and Making Mock* 133-134 (Farrar, Strauss and Giroux 1998) 48

H. Wass, R. Neimeyer *et al.*, eds., *Dying: Facing the Facts,* 49-88 (3d ed., Taylor and Francis 1995) 45

Ron Word, *Execution Fire Stirs Dispute: Electric Chair Woes Could Delay Sentences,* Fla. Times-Union, March 26, 1997 5

BRIEF FOR PETITIONER

OPINION BELOW

The unpublished order of the Florida Supreme Court was entered on October 20, 1999, and is reprinted in the Joint Appendix (hereinafter "J.A.") at page 6. The opinion of the Florida Supreme Court in *Provenzano v. Moore* is reported at 1999 WL 756012 (Fla. Sept. 24, 1999) and the slip opinion, which will be cited in this brief, is reprinted in the Joint Appendix (hereinafter "J.A.") at pages 47-132.

JURISDICTION

The Florida Supreme Court entered its judgment on October 20, 1999. The petition for certiorari was filed on October 21, 1999, and granted on October 26, 1999. *Bryan v. Moore*, 120 S.Ct. 394 (1999). This Court has jurisdiction under 28 U.S.C. § 1257(a), petitioner having asserted rights under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution, which provide in relevant part:

> "[N]or [shall] cruel and unusual punishments [be] inflicted."

U.S. Const. amend. VIII.

> "No State shall . . . deprive any person of life [or] liberty . . . without due process of law.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. THE SERIES OF EVENTS GIVING RISE TO THESE PROCEEDINGS

As current was applied during Florida's 1990 electrocution of Jesse Tafero, flame and smoke shot up around his head (R3.42). When the electricity was turned off, Mr. Tafero's head was "nodding back and forth." His chest "was moving in." He seemed "to be gasping for air." A leg moved (R3.43, Pet. Ex. 24, No. 40).[1] The attending physician reported that "spasmodic respiratory sounds were audible" (*Id.*). The electricity was turned back on.

Again flames and smoke rose from Mr. Tafero's head (R3.43-44). When the electricity was turned off, Mr. Tafero's head was nodding (R3.44). There "appeared to be a couple of deep breaths from Tafero" (R3. Pet. Ex. 24, No. 40). The physician reported that "spasmodic respiratory sounds produced oral and nasal fluid gurgling" (*Id.*). The electricity was turned on again.

Again flames and smoke shot up (R3.44-45). Now, when the electricity ceased, Tafero was still (R3.45). What had happened was to be a subject of controversy that would capture increasing judicial concern over the next decade. "According to Robert H. Kirschner, M.D., Tafero

---

[1] Citations in this brief are as follows: "R1. V[olume #]." refers to the April 1997 hearing in *Jones v. Butterworth*, 695 So. 2d 679 (Fla. 1997), which is not consecutively paginated. "R2." refers to the July 1997 hearing in *Jones v. State*, 701 So. 2d 76 (Fla. 1997). "R3." refers to the July 1999 hearing in *Provenzano v. Moore*, ___ So. 2d ___ (Fla. Sept. 24, 1999). Both "R2." and "R3." are consecutively paginated. Exhibits are designated by the appropriate record and exhibit number, with "Pet. Ex." referring to Petitioner's exhibits and "St. Ex." referring to State's exhibits. For example, "R3. Pet. Ex. 1" refers to Petitioner's Exhibit 1 in the July 1999 Provenzano hearing.

was not dead until the third jolt of electricity was administered and may have remained conscious during the first and second jolts." *Buenoano v. State*, 565 So. 2d 309, 315 (Fla. 1990) (Kogan, J., dissenting). Visibly, Mr. Tafero's head "was burned and charred, his face was seared by flames, and his eyebrows, eyelashes, and facial hair were burned." *Jones v. State*, 701 So. 2d 76, 87 (Fla. 1997) (Shaw, J., dissenting).

During Florida's 1997 electrocution of Pedro Medina, first smoke and then flame rose from Mr. Medina's head (R3.78-79). The flames flared up 6 to 12 inches; the smoke filled the chamber (R1. V3. 82, 86; R2.265, 282, 289). There was no visible reaction by the execution team (R1. V8. 103). The prison superintendent said, "Proceed" (*Id.* at 144). After the electricity was turned off, Mr. Medina "took a gasping breath. There was an interval, he took a second gasping breath. There was another interval of some seconds, and he took the . . . third gasping breath. And after that third breath, I could see his body slumped" (R3.83). Mr. Medina's head "was burned and charred and his face was scalded." *Jones*, 701 So. 2d at 87 (Shaw, J., dissenting).

Allen Lee Davis was seated in Florida's electric chair in July, 1999. After all of the apparatus was affixed to Mr. Davis, witnesses heard him make two separate sounds described as "screams," "yells," "moans," "high-pitched murmurs," "squeals" or "groans" (R3.162-63, 197, 217, 278, 280, 290, 706, 721-22), or like "a scream with someone having something over their – their mouth. It obviously was a great degree of anguish associated with it from the sound of it" (R3.181). Members of the execution team who heard these sounds ignored them because they were not unusual during an electrocution (R3.330-31, 358-59, 398-99). Before the current was turned on, the one team member who could see under the mask covering Mr.

Davis' face observed blood in Mr. Davis' left nostril but did not alert anyone because "it wasn't nothing but a nosebleed" (R3.327-28). Seconds after Mr. Davis' body tensed under electricity, witnesses saw blood coming from beneath the mask, dripping down onto Mr. Davis' collar, a pool of blood beginning to form a dinner-plate-sized stain on his shirt (R3.166-68). After Mr. Davis' body stopped tensing, witnesses saw his chest move "back and forth several times" (R3.168, 222). Post-execution photographs of Davis showed an "unquestionably violent" and "ghastly" scene. *Provenzano v. Moore*, ___ So. 2d ___ (Fla. Sept. 24, 1999), slip op. at 52-53 (Shaw, J., dissenting). *See* R3. Pet. Ex. 1.

Following Jesse Tafero's fiery execution, Judy Buenoano challenged Florida's electrocution process as a cruel and unusual punishment. *Buenoano v. State*, 565 So. 2d 309 (Fla. 1990). The Florida Supreme Court noted that the Florida Department of Corrections ["DOC"] had "determined that [in the Tafero execution] for the first time a synthetic, rather than a natural, sponge had been used in the headpiece" and "that the burning of the sponge caused the flames and smoke." *Id.* at 311. The court "presumed that members of the executive branch will properly perform their duties" regarding carrying out death sentences, ruled that the Tafero mishap did not "justif[y] judicial interference with the executive function," and held, "[d]eath by electrocution is not cruel and unusual punishment, and one malfunction is not sufficient to justify a judicial inquiry into the Department of Corrections' competence." *Id.* Three justices dissented, arguing that an evidentiary hearing should be ordered. *Id.* at 311-15.

The Medina execution thereafter attracted renewed attention. But not all agreed that serious concern was warranted. Attorney General Butterworth commented

that "People who wish to commit murder, they better not do it in the state of Florida because we may have a problem with our electric chair." Ron Word, *Execution Fire Stirs Dispute: Electric Chair Woes Could Delay Sentences*, Fla. Times-Union, March 26, 1997, at A1. Florida Senate Majority Leader Locke Burt stated that the alternative of lethal injection "appears to be a medical procedure and a painless death is not punishment. I think it's important that there is a deterrent and a punishment element." Jackie Halifax, *Execution Method Debated: Legislators Defend Electrocution*, Fla. Times-Union, March 27, 1997, at B7. Victor Crist, House Justice Council Chair, remarked, "There is only one method that is sure and painless, and that is the guillotine." Word, *supra*, at A1. DOC Secretary Singletary observed, "It's not a perfect world. We sent the space shuttle up and blew it up. Do we stop that? It's not a perfect world when human beings are involved." Jeffrey Brainard, *Faulty Execution Renews Debate: Governor Orders an Investigation Into What Went Wrong With the Chair After Flames Erupt From the Inmate*, St. Petersburg Times, March 26, 1997, at 11A. State Senator Charlie Crist concluded that "obviously the thing works. It did what it was designed to do. It put [Medina] to death." Peter Wallsten, *Medina Felt No Pain, Say Doctors*, St. Petersburg Times, April 1, 1997, at 5B. Alan Gutman, Chair of the Senate Criminal Justice Committee commented: "[A]ll those in Florida understand that if they kill someone, they're going to go through the same process." *Id.*

Following Pedro Medina's fiery execution, Leo Jones challenged Florida's electrocution process as cruel and unusual punishment. *Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997). The Florida Supreme Court dismissed Jones' "claim that execution by electrocution is unconstitutional per se" as procedurally barred, but "[d]ue to the fact that

flames have erupted on two occasions during electrocutions conducted in Florida's electric chair," it ordered an evidentiary hearing on whether "electrocution in Florida's electric chair in its present condition is cruel or unusual punishment." *Id.* at 482. Three justices dissented, saying that the scope of the hearing should not be restricted. *Id.*

A first (April 1997) hearing in the *Jones* case was found to be inadequate, and the Florida Supreme Court ordered another, *Jones v. Butterworth*, 695 So. 2d 679 (Fla. 1997), while "reiterat[ing] that the sole issue to be determined is whether or not electrocution in Florida's electric chair in its present condition is cruel or unusual punishment." *Id.* at 681. At the second (July 1997) hearing, Jones presented expert witnesses in forensic pathology, neurophysiology, neurology and electrical engineering, as well as additional lay witnesses to executions, and the State presented additional medical and engineering witnesses. The trial court found: the flame and smoke during Medina's execution were caused by an improperly moistened sponge in the headpiece and this problem had been fixed; "Medina's brain was instantly and massively depolarized within milliseconds of the initial surge of electricity"; DOC had adopted written testing and electrocution procedures; the electric chair was in "excellent condition"; prison staff were "qualified and competent to carry out executions"; and "[a]ll inmates who will hereafter be executed in Florida's electric chair will suffer no conscious pain." *Jones v. State*, 701 So. 2d 76, 77 (Fla. 1997). The trial court concluded as a matter of law that:

> (1) Cruel or unusual punishment is defined by the Court as the wanton infliction of unnecessary pain.
>
> (2) Florida's electric chair, in past executions, did not wantonly inflict unnecessary pain

> and therefore did not constitute cruel or unusual punishment.
>
> (3) Florida's electric chair, as it is to be employed in future executions pursuant to the Department of Correction's written testing procedures and execution day procedures, will result in death without inflicting wanton and unnecessary pain, and therefore, will not constitute cruel or unusual punishment.
>
> (4) Florida's electric chair in its present condition does not constitute cruel or unusual punishment.

Jones, 701 So. 2d at 77-78 (citations omitted). The Florida Supreme Court rejected Jones' argument that a proper analysis of his constitutional claim had to consider whether electrocution involved an impermissible *risk* of pain, holding that "[i]n order for a punishment to constitute cruel or unusual punishment, it must involve torture or a lingering death or the infliction of unnecessary and wanton pain." *Id.* at 79 (internal quotation marks and citations omitted). Concluding "[t]here was substantial evidence presented in this case that executions in Florida are conducted without any pain whatsoever," *Id.* at 79, and finding "competent substantial evidence" to support the trial court's order, the Florida Supreme Court held, "electrocution in Florida's electric chair in its present condition is not cruel or unusual punishment." *Id.* at 80.

Thomas Provenzano's execution was scheduled for the day following Allen Davis' bloody execution in 1999. On Mr. Provenzano's petition, the Florida Supreme Court stayed his execution, allowed amendment of his bare-bones petition, and ordered an evidentiary hearing on the amended petition. *Provenzano v. Moore*, 737 So. 2d 551 (Fla. 1999). At this (July 1999) hearing, evidence was received regarding Florida's electrocution procedure, the use of electrocution as a mode of execution in the United

States, and scientific analyses of electrocution as used for this purpose.

The trial court concluded that the electric chair functioned as intended in the Davis execution; that the Davis execution did not violate the DOC's written procedures; that Davis did not die of asphyxiation from the mouth strap; that Davis underwent instant and painless death once the current was applied; that the nose bleed began before the current was applied and was not caused by the current; that the straps may have caused Davis discomfort but not unnecessary and wanton pain; that the mouth strap is not part of the electrical operation of the electric chair; that a redesigned mouth strap could accomplish the same purpose as the present one; and that any pain associated with the straps "is necessary to ensure that the integrity of the execution process is maintained" (R3.2297-98). Ultimately the trial court held that: "Execution by electrocution in Florida's electric chair as it exists in its present condition as applied [sic] does not constitute cruel or unusual punishment, and therefore, is not unconstitutional" (R3.2298).

By a vote of 4 to 3, the Florida Supreme Court affirmed, holding that "Florida's electric chair is not cruel or unusual punishment." *Provenzano v. Moore*, ___ So. 2d ___ (Fla. Sept. 24, 1999), slip op. at 5. The appellate court made no factual findings of its own but deferred to the trial court's conclusions under the state-law "competent substantial evidence" standard. *Id.* at 4-5. All four justices in the majority, however, urged the Legislature to adopt the alternative of lethal injection. *Id.* at 9 (Harding, C.J., joined by Lewis, J., specially concurring); *id.* at 15 (Wells, J., joined by Quince, J., concurring). The three dissenting justices argued that the majority had applied a flawed constitutional standard to Mr. Provenzano's claim. *Id.* at

24 (Shaw, J., dissenting); *id.* at 68 (Anstead, J., dissenting); *id.* at 72 (Pariente, J., dissenting).

When Florida scheduled Anthony Bryan to be executed, he filed a petition in the Florida Supreme Court challenging his imminent execution by electrocution. Mr. Bryan asked that the court adopt and consider the records in *Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997), *Jones v. Butterworth*, 695 So. 2d 679 (Fla. 1997), *Jones v. State*, 701 So. 2d 76 (Fla. 1997), *Provenzano v. State*, Fla. Sup. Ct. No. 95,849, and *Provenzano v. Moore*, Fla. Sup. Ct. No. 95,973, in adjudicating his petition. He alleged that his execution by electrocution would violate the Eighth Amendment in that he would be subjected to an unconstitutional risk of suffering, degradation, physical violence, disfigurement, mutilation, pain, and lingering death in a number of ways: through the forceful strapping procedure; through the State's employees' ignoring his moans, screams, bleeding or partial asphyxiation; through burning from fire, scalding and/or electricity, not only at the electrode points but on his face, forehead, groin, genitals and pubic region; through violent convulsions as electricity reaches his body tissues; through the failure of the electricity to render him instantly insensible; through unpredictable human errors in placing the head and leg electrodes; through other unanticipated malfunctions; through being made the subject of a ghastly display; and through the psychological torment of awaiting his execution with awareness of all these possibilities (Petition at 3-10).

On October 20, 1999, the Florida Supreme Court granted Mr. Bryan's motion to adopt the records and take judicial notice of the several *Jones* and *Provenzano* proceedings. Pursuant to its opinion in *Provenzano*, it denied Mr. Bryan's petition on the merits. This Court granted certiorari.

B. THE PRACTICE OF ELECTROCUTION AS A METHOD OF EXECUTION

Twenty-six states at one time authorized execution by judicial electrocution (R3. Pet. Ex. E at 4). Of the twenty-six, twenty-two have now abandoned electrocution completely or as the sole method of execution.[2] No State has adopted judicial electrocution since 1949.[3] Thus, at present, among the thirty-eight States that still use capital punishment,[4] only four – Florida, Alabama, Georgia, and Nebraska – mandate judicial electrocution as the mode of killing. No jurisdiction outside the United States uses judicial electrocution to administer capital punishment.[5]

The Florida Corrections Commission analyzes the status of Florida's corrections system and recommends changes in that system to the Governor and Legislature. Fla. Stat. § 20.315(4)(b)(2) (1995). In 1997, after the Medina execution, the Commission conducted a survey of execution methods in other states and presented its findings and recommendations in *Supplemental Report: Execution Methods Used By States* (J.A. 144-238; R3. Pet. Ex. E). The Commission recommended that Florida enact legislation allowing lethal injection as an alternative to electrocution for persons currently on death row and as the sole method for those sentenced to death after the legislation

---

[2] R3. Pet. Ex. E at 4 (in 1997, six states used electrocution as the sole means of execution); R3. Pet. Exs. A, B (by 1999, Tennessee and Kentucky had also abandoned electrocution).

[3] *Provenzano v. Moore*, slip op. at 56 (Shaw, J., dissenting); 1949 W. VA. ACTS 37 (West Virginia in 1949, was the last state to adopt judicial electrocution).

[4] R3. Pet. Ex. E at 7.

[5] *Provenzano v. Moore*, slip op. at 56-57, 67 (Shaw, J., dissenting).

became law (*Id.* at 28). In preparing its report, the Commission conducted a telephone survey of seventeen States to discuss their methods of execution (R3. Pet. Ex. E at 8). If a State had changed from electrocution to lethal injection, its officials were asked what prompted the change (*Id.* at 9). The most common reason given was that lethal injection was considered a "more humane method of execution" (*Id.* at 10).

C. VIOLENCE, MUTILATION AND PHYSICAL INDIGNITY

Neither the trial courts nor the Florida Supreme Court have addressed Bryan's contention that electrocution violates the Eighth Amendment because of its violence, mutilation of the body and visible barbarity. Dissenters on the Florida Supreme Court have noted the majority's failure to address these issues. *Provenzano v. Moore*, slip op. at 24 (Shaw, J., dissenting) (in *Jones*, "[t]he Court did not address violence or mutilation"); *id.* at 25 (the trial court in *Provenzano* "did not address the issues of violence or mutilation or the overall record of electrocution as a method of execution in Florida"). By default, the dissenters' conclusions that violence and mutilation are inherent in the Florida electrocution procedure stand as the only judicial findings in the record on this point.[6]

---

[6] *See Provenzano v. Moore*, slip op. at 43-44 (Shaw, J., dissenting) ("[n]ot only was every execution in Florida accompanied by the inevitable convulsing and burning that characterizes electrocution, but further, three executions in particular were marred by extraordinary violence and mutilation") (footnote omitted); *id.* at 52-53 (photographs of Davis "show a ghastly post-execution scene" which is "unquestionably violent"); *id.* at 53 ("[i]n even the 'successful' executions, the inmate was subjected to violence (i.e., the inmate was administered an electrical force that caused him to convulse

Those conclusions reflect the substantial evidence presented to the Florida courts on the subjects of the physical harrowing, degradation, and disfigurement worked by the Florida electrocution machinery. Witnesses to the electrocution process describe the condemned's body contracting forcefully and thrusting against the chair and straps when the electricity is engaged. Experts explain that this phenomenon results from electrical stimulation of muscle cells, causing the skeletal muscles to tetanize and pull against each other (R3.450, 573-75, 653-54). The same electrical effect paralyzes the respiratory muscles (R3.654). Post-electrocution examination shows characteristic physical deformations such as those seen in the following examples:

(1) Allen Davis' body displayed a halo of electrical burns on the scalp, burns on the right side of the face and above the eyebrow, an arcing burn on the lower abdomen or suprapubic region, a burn on the inner aspect of the right thigh, and a burn on the right calf (R3.740-41). The burns to his suprapubic region and inner right thigh were "full thickness burns," meaning that they extend all the way through the skin to the subcutaneous tissue (R3.756). These are "arcing burns" which occur when "the electricity comes out of the skin or travels in the subcutaneous tissues under the skin and is exited at that particular point and perhaps even re-enters the skin there" (R3.756).

---

violently) and mutilation (i.e., the body of each inmate was burned on the head and leg as a result of the electrocution process)"); *id.* at 71 (Anstead, J., dissenting) ("electrocution always involves mutilation (within and without the body) and a substantial risk of malfunction (including external burning, bleeding, asphyxiation, etc.), as well as a culture of cruelty ('burn 'em,' 'fry 'em')"); *id.* at 81 (Pariente, J., dissenting) ("it is undisputed that despite all of the best efforts, electrocution will result in burning of parts of the body").

The headpiece sponge came down over Mr. Davis' forehead, causing burns, and below those burns are additional "drip burns" (R3.759, Pet. Ex. 1-H). "Drip burns" are not arcing but are "electrical burns associated with the saline in the sponge that is dripping down to the eyebrow" (R3.759).[7]

(2) Photographs of Leo Jones' body show a 3/8-inch deep wound in the top of the head, a wound on the right leg, a wound near the left temple, a swollen area on the back of the head, a chest puncture 1/8 of an inch in diameter, a severe burn from 1/8 to 1/4 of an inch deep going from the calf up to the knee, and a swollen area on the face (R3.135-38; Pet. Ex. 4). Up to 5:30 a.m. the morning of his 7:00 a.m. execution, Mr. Jones did not have these wounds on his body (R3.139, 150).

(3) Pedro Medina's autopsy revealed a "burn ring of the scalp with deposits of charred material," "a scald injury of the scalp and face" and a "circumferential" burn of the right calf (R1. V9. 78-79). Part of the scalp burn extended "full thickness through the scalp to the bone" (R2.915). From Medina's forehead down to his nose and cheeks, the skin was scalded from steam (*Id.* at 915-16).

D. THE RISK OF CONSCIOUS PAIN DURING ELECTROCUTION

The record presented to the Florida Supreme Court contains substantial evidence (including expert testimony) adduced by condemned persons to prove that electrocution under Florida's procedures involves the conscious experience of intense physical pain. The State's

---

[7] In Mr. Davis' execution, the head sponge was "very wet" and a lot of water dripped on Mr. Davis' back and front (R3.321, 322-23). According to execution team members, the head sponge is supposed to be dripping wet (R1. V4. 45, 119; R3.1371).

sole rebuttal took the form of evidence (including expert testimony) aimed to prove that the application of electric current to an inmate under Florida's procedures inevitably causes instantaneous destruction of the brain's capacity to experience sensory stimulation (including pain). In this section, we summarize the evidence on both sides of this issue, for the purpose of showing that the record as a whole establishes the existence of a significant risk of conscious physical pain attending a Florida electrocution, and that the factual findings made on the point by the courts below fail to address all of the dimensions of this risk.

Experts presented by both parties in the *Jones* and *Provenzano* hearings agreed that the electrical activity of the brain during a judicial electrocution has never been measured and cannot be measured because the electrical current from the execution would obscure any measuring devices (R3.635, 637; R2.408, 677, 1038-39). The experts also agreed that no scientific experiments have been conducted applying 2300 volts – the maximum amount administered during Florida's electrocution procedure – to a human being (R2.422, 465, 711, 1038).[8] There are no published scientific studies regarding the path that electrical current follows through a person's body during a judicial electrocution (R2.476, 677, 705-06). No one knows how much current is necessary to instantly disable the brain because it is impossible to conduct such a study (R3.683; R2.711).

Experts for both parties also identified another area of inveterate uncertainty. They agreed that it is difficult to

---

[8] Under the Florida procedure, electricity is supposed to be delivered to the condemned for 34 seconds. The circuitry is preset to deliver 2300 volts for 8 seconds, 1000 volts for 22 seconds and 2300 volts for 8 seconds (R1. V6. 209), but the last 8-second period is manually cut off after 4 seconds (R1. V4. 188).

determine from an external examination whether or not a person is conscious (R2.663, 1045). Patients who were believed to be unconscious from external examination are sometimes later able to recount details of their surroundings and events that occurred while they were thought to be unconscious (*Id.*). Autopsy cannot determine the moment a person became unconscious (R2.144, 1038).

On the subjects of consciousness and the risk of conscious pain, the condemned inmates presented the following experts: John Wikswo, Ph.D., who specializes in physics, biological physics, electromagnetics, biomedical engineering and electrophysiology (R3.611-12); J. Patrick Reilly, an expert in the effects of electricity on biological systems including the human body (R3.545); Orrin Devinsky, M.D., who specializes in neurology and clinical neurophysiology (R2.647); and Donald Price, Ph.D., a neurophysiologist (R3.406). Wikswo, Devinsky and Price testified that judicial electrocution is unlikely to result in instantaneous unconsciousness and is likely to result in extreme conscious pain. Reilly explained the fundamental background principles regarding the effect of electricity on biological tissues.

On these issues, the State presented the following experts: Kris Sperry, M.D., a forensic pathologist (R3.852); William Hamilton, M.D., a medical examiner (R3.1054); B. J. Wilder, M.D., a neurologist specializing in epilepsy (R3.1128); and Michael Morse, Ph.D., a biomedical engineer (R1. V7. 13).[9] These witnesses testified that judicial electrocution instantly disables the brain so that the condemned experiences no pain.

---

[9] The State also presented emergency room physician Bullard, who had no opinion on the effects of electrocution on the brain (R3.1312), and cardiologist Goldman, who did not discuss the effects of electrocution on the brain (*See* R2.757-801).

1. Background data and scientific principles

a. The effects of electrical trauma on consciousness

Wikswo, Price and Devinsky recited case studies reported in the scientific literature regarding people who suffered high voltage electrical trauma, including head contact with high voltage, but retained consciousness during the event and were able to describe the pain they experienced (R3.639-45; J.A. 133-143; R2.352-53, 680-84). Wikswo's review of the literature indicates that "there is no single threshold [of current] for loss of consciousness" (R3.683). Devinsky described a patient whose head contacted over 3,000 volts, with the current exiting from his feet, but who "recalled a very painful sensation" (R2.678-80). Wilder agreed that victims of high voltage electrical accidents "are not necessarily rendered unconscious" and that victims of lightning strikes often describe feeling pain (R2.1043-44).[10] Other evidence bearing on the question whether the brain is instantly incapacitated by electricity includes reports about people who have undergone electroconvulsive therapy ["ECT"].[11] Devinsky and Price testified that patients who had undergone ECT before anesthesia was used were not rendered unconscious but reported painful experiences

---

[10] Sperry described patients who touched a wire carrying 15,000 to 20,000 volts with their hands and suffered deforming burns of their hands and arms (R3.902-03). When they came into the emergency room, they were conscious (R3.903). They were alive when found and did not have to be resuscitated (R3.903).

[11] ECT is performed by placing two electrodes on the scalp, either on the temples or on the forehead and back of the head to try to direct the current directly across the brain (R2.685, 1001). ECT uses 120 to 150 volts (R2.684, 1000). Before 1960, no anesthesia was used during this procedure (R2.685).

(R2.356, 685-86). Morse agreed ECT patients report pain and discomfort (R1. V8. 56).

b. The amount of current reaching the brain

In lay terms, electricity generally follows the path offering the least resistance (R1. V8. 36). When a human body is part of the electrical circuit, as in a judicial electrocution, the body provides resistance (R2.551, 691). Body tissues have differing resistances and thus provide a variety of paths for electrical current to follow (R2.396, 439, 557, 689, 1016, 1022, 1028, 1192). Bone is among the most resistive body tissues, while blood vessels and muscles are among the least resistive and hence most highly conductive (R2.228, 396, 439-40, 691-92, 1036; R1. V8. 36-37, 44).[12] Thus, it cannot be assumed, simply because there are electrodes on the head and leg during a judicial electrocution, that the current follows the shortest path from the head to the leg. The brain is shielded from the current by the highly resistive skull and by highly conductive tissues such as the scalp outside the skull and the cerebral spinal fluid inside the skull (R2.430, 691-92; R3.434, 561-63, 567-69).[13]

Another important background principle in considering the physiological effects of electricity is that *current density*, rather than *current* alone, is associated with

---

[12] Sperry recognized that current coming into the body through the head electrode would spread out and that the path the current would follow depends upon the resistance of body tissues (R3.895-97). Wilder and Morse agreed (R3.1179-80; R1. V7. 101, V8. 36-37).

[13] The burn ring on the head of an electrocuted person confirms that the skull is deflecting current (Wikswo 1997 report at 14-17). If the skull was not deflecting current and current was not therefore traveling towards the edge of the head sponge, the burn would be a solid disk rather than a ring (*Id.*).

degrees of tissue destruction (R3.560). High current density is more likely to cause physiological damage than low current density (R3.560-61). In a judicial electrocution, the current density at any one point in the body is less than the current coming in (R3.561-63), and current density will not be uniform throughout the body (R3.567).[14]

2. The debate over whether judicial electrocution produces instant unconsciousness, precluding conscious pain

a. The condemned inmates' witnesses

Because consciousness is not controlled by one particular area of the brain and because areas of the brain react differently to electrical current, Devinsky testified that it is not likely that judicial electrocution causes immediate unconsciousness (R2.661, 732). Price explained that regions controlling arousal and consciousness are located deep in the brain, removed from the source of the current, so the current density in those areas is likely to be less than in superficial areas (R2.385). Based upon behavioral, neurophysiological and anatomical evidence, Price testified that "it is highly, highly unlikely that the initial current surge [in a Florida judicial electrocution] would instantly and permanently . . . incapacitate the human brain" (R3.430; R2.385). Wikswo testified that "it may be possible for an inmate to maintain consciousness for 15 to 30 seconds into the execution" (R3.650).

---

[14] Although no actual measurements have ever been made (R3.571), Reilly estimated that during a judicial electrocution the current density in the scalp will be about 50 times higher than that within the brain (R3.569-71).

In addition to the scientific evidence and principles discussed above, two categories of observations of judicially electrocuted persons indicate that unconsciousness is not likely instantaneous. First, witnesses regularly report that the condemned person exhibits breathing-like motions of the chest after the electricity stops. Numerous witnesses to the Davis execution reported that Mr. Davis' chest expanded two to four times over several minutes after the electricity stopped (R3.168, 201, 222, 228, 294, 303, 334, 708, 1027, 1041). One Davis witness, a prison employee who had attended more than 10 executions, saw that type of chest movement in several of them (R3.296). The phenomenon was reported in the Tafero execution (R3.43-44; Pet. Ex. 24, No. 40), the Medina execution (R3.83, 239-40; R1. V5. 106), and the Jones execution (R3.127-28).

The significance of the chest movements is that respiration is controlled by the brainstem (R2.70-72, 175-77, 696-97, 943-44, 957, 1011, 1029). Even respiratory movements which are not frequent or deep enough to take in oxygen effectively still indicate brainstem function (R2.72, 198, 733, 1011-12).[15] If the brainstem, which is part of the brain (R2.1063-64), retains some function after the electrocution cycle is complete, it follows that the person's whole brain was not instantly incapacitated at the beginning of the cycle (R3.627-29, 751; R2.189-90).[16]

---

[15] Wilder agreed that breathing motions at the end of an electrocution could indicate a "firing of neurons" in the respiratory center of the brain stem (R3.1197). Sperry testified that such breathing motions "would mean that at least the brain stem still had some minimal functioning" (R3.999).

[16] Respiratory centers are located deep within the brain and are close to the deep pain centers (R3.440). Thus, if there is evidence of respiratory actions after an electrocution, it is likely

Second, sometimes the condemned has a palpable pulse after the electricity stops. When physician's assistant Mathews examined Pedro Medina after the execution, Mathews felt an agonal pulse or irregular beat in Mr. Medina's wrist (R3.1046). Mathews has attended about 30 executions, and it is not unusual to find such a pulse (R1. V5. 104). Mathews sometimes hears twelve to twenty-four erratic, irregular heartbeats after an execution (*Id.* at 113). With Mr. Medina, Mathews also heard irregular heart sounds with a stethoscope (*Id.* at 113, 116). Dr. Almojera, who approached Mr. Medina only after Mathews examined him for 3 to 5 minutes, heard "gurgling" sounds in Mr. Medina's chest indicating air and fluid moving (R1. V9. 128, 137).

The fact that the heart can continue to function after the cessation of the current also indicates that unconsciousness is not instant. A pulse can occur only if the heart is beating and pumping blood (R2.53, 174, 669, 783, 797, 1033). The heartbeat is created by regular electrical impulses flowing in the heart (R2.666, 764-67). Because both the heart and the brain rely on organized electrical chemical activity to function, the heart is a model of how electrocution affects the brain (R2.383). If the heart's operation is not immediately and totally stopped, there is no basis for saying the brain's operation is immediately and totally stopped (R2.382-84, 699, 212). In fact, the brain is more likely to continue functioning than the heart because the brain is protected by the skull which offers greater resistance to the current than the soft tissues and fluids surrounding the heart (R2.384, 699).

Based on the evidence and scientific principles described, Wikswo, Price and Devinsky concluded that

---

that the pain centers in that area were not instantly and permanently destroyed (R3.440).

judicial electrocution is not instantly incapacitating (R3.430, 650; R2.376, 675). Thus, Price believed that "there is a very high likelihood that judicial electrocution . . . is excruciatingly, intensely painful and produces feelings of horror, dread and other negative experiences" (R2.352; R3.423). He explained that electrocution causes both direct and indirect pain: Direct pain results from the current activating particular areas of the brain, while indirect pain is caused by the current's effect on other bodily tissues such as stoppage of the heart, asphyxiation or the full contraction of skeletal muscles (R2.361, 379, 405; R3.424).

Devinsky agreed that judicial electrocution can cause conscious pain and suffering and that electrical current causes both spasmodic muscle contractions and repetitive activation of the brain's nerve cells (R2.676, 670). In addition, Devinsky testified, "for the electricity to get into the brain it has to pass through at least four pain sensitive structures, so one would expect there would have to be initial pain" before consciousness is lost (R2.699).

Wikswo explained that during the period of consciousness, the condemned will experience several kinds of pain (R3.653). All skeletal muscles will tetanize and pull against each other, causing intense pain (R3.653-54). The respiratory muscles are paralyzed, so blood levels of carbon dioxide rise quickly, creating a sense of suffocation (R3.654). The current will also directly stimulate pain centers of the brain so that the brain perceives pain elsewhere in the body, although the sensations are generated within the brain (R3.655).[17]

---

[17] Price has made direct observations of this phenomenon when neurosurgeons or physiologists have placed electrodes deep in the brain and stimulated the brain with electricity (R3.426). Such a direct application of electricity to brain cells can

b. The State's witnesses

Sperry testified that a current level such as that applied to Allen Davis causes instant unconsciousness (R3.849-50), and that death occurs "within seconds as the brain is heated well above a temperature from which it cannot recover" (R3.851, 873-74). Wilder testified that current such as that in the Davis execution would cause unconsciousness in milliseconds (R3.1150-51) and disables structures deep in the brain, such as the brain stem (R3.1152). Wilder testified that within a few milliseconds, the person could not receive any sensation (R3.1152). Morse testified that Pedro Medina was rendered instantly unconscious and unable to feel pain (R1. V7. 16-17). He based this opinion on reports in the scientific literature that people who have survived electric shocks in the head have no recollection of pain (*Id.* at 105-06).[18]

Neither Morse nor Sperry was familiar with any instances of people having head contact with high voltage and retaining consciousness (R1. V8. 55-56, 57; R3.884-85). Wilder was aware that people have survived head contact with high voltage and have remembered

---

cause the person to feel pain (R3.426). If an area of the brain responsible for perceiving pain is directly stimulated with electricity, the person will feel pain even if there is nothing causing a pain to the person's body (R3.435-37, 450). Wilder agreed that this phenomenon occurs (R3.1167-68).

[18] Hamilton believed that applying the current level used in the Davis execution through a current path from head to leg results in immediate loss of consciousness and death (R3.1079). In Hamilton's opinion, the current path was "from the top of the head through the brain, brain stem, through the center of the body, then exiting out through the electrode on the leg" (R3.1079-80). Hamilton believed that skin is the most resistant body tissue and did not know how bone "rates in body tissues as far as conductivity" (R3.1123).

these events (R3.1161-62). Regarding individuals who have reported retaining consciousness while contacting 100,000 volts, Wilder testified, "I think it is a discussion that you really – it is very difficult to pursue because you are talking about massive voltages and currents and you are trying to apply that to a normal physiological situation, and I can't do that" (R3.1173).

Wilder had not seen any information about judicial electrocutions in which the current cycle was completed, the person was seen moving, and the current cycle was then repeated (R3.1183). He believed information about breathing motions at the end of an electrocution "is not significant" (R3.1199). Sperry had no information about condemned people exhibiting chest movements after the current was turned off and thus could render no opinion about that (R3.998). Morse could not discuss the significance of breathing motions, as that was beyond his expertise (R1. V7. RVII. 112).

Sperry had not studied electricity (R3.893). Although he was of the view that a thermal effect disables the brain during electrocution, he had done no research into how fast the thermal effect occurs (R3.894). Sperry knew of no studies showing exactly how fast the temperature will rise in the brain during electrocution: "To my knowledge, no one's ever done that sort of research. No, I don't think you could" (R3.895). Sperry agreed that the thermal effect of current would depend upon the current density at any particular point (R3.1012). Sperry had no opinion about the minimum current required to disable the brain (R2.929, 955), did not know the resistance of the skull or how much current passes through the skull into the brain (R2.936), had no training in determining the path of electricity through the human body (R2.941), and had not studied the effects of electricity on the brain (R2.945).

Wilder testified that although studies have been done to determine how to guarantee a specific current pathway during electroconvulsive therapy, "you can't really guarantee a certain pathway" (R3.1189). In the case of current entering through the head electrode and sponge used in a Florida judicial electrocution, Wilder "would have no way of knowing" how much current went into each brain cell (R3.1179, 1182). Wilder was "not terribly familiar with" the concept of current density (R3.1178), was "certainly no expert in electrical phenomena" (R2.1012), did not have much expertise regarding the resistance of the skull (R2.1015), was not sure about the resistance levels of different types of bone (R2.1022), had not studied the path electrical current follows in the body (R2.1035), did not know the amount of current which reaches the cortex during a judicial electrocution (R2.1051), and did not know the amount of resistance the current must overcome before reaching the cortex (R2.1053).

In April 1997, Morse had not done any studies of the current path during a judicial electrocution (R1. V8. 38). He was "just starting into . . . the way current might distribute itself in an execution" and did not know the current path (*Id.* at 42, 58). In July 1997, Morse had done some "preliminary" work regarding the "nagging question" of "where the current goes when it leaves the head piece" in a judicial electrocution (R2.1145). Based on this "preliminary" model he concluded that the electrical current administered during a judicial electrocution instantly disables the brain (R2.1155).

E. PRE-ELECTROCUTION PAIN

In the Florida Supreme Court, Mr. Bryan argued that execution in Florida's electric chair involves an undue risk of painful asphyxiation because of the design of the

mouth strap and the manner in which it is affixed. In *Provenzano,* the trial court had made the findings summarized at pages 8-9 *supra* regarding the mouth strap, including findings that: (1) Davis' death "did not result from asphyxiation caused by the mouth strap"; (2) the mouth strap "may have caused Davis to suffer some discomfort," but not "unnecessary and wanton pain"; (3) execution "may involve some degree of pain" including pain from straps, but "any pain associated therewith is necessary" to ensure "the integrity of the execution process"; and (4) the use of a mouth strap "may be desirable, but "a smaller and/or redesigned mouth strap could accomplish the same purpose." (R3.2297-98). Noting the latter finding, the Florida Supreme Court majority said that "it may be appropriate for DOC to revisit . . . the use of the mouth strap," but the majority did not discuss whether there was a risk of pain associated with the present mouth strap or how much. *Provenzano,* slip op. at 5. The pertinent evidence is this:

1. How the mouth strap is designed and affixed

In Florida a condemned person's legs, arms, waist, chest and head are strapped to a wooden chair, and electrical circuitry is attached to the person's head and right calf. Since May, 1992, prison employees Thomas, McNeill and Hackle have been responsible for strapping the condemned to the chair and electrical circuitry (R3.306; 313; 345; 351). Each man determines how tight to affix the straps (R3.316). Thomas is supposed to affix the straps "[a]s tight as I can get them" (R3.316). McNeill makes sure the straps he affixes are "tight and snug" (R3.353-54).

Petitioner's Exhibit 5 in *Provenzano* is the mouth strap used in a series of executions, including Allen Davis'

(R3.316-17, 349, 830).[19] The mouth strap is "at least an eighth of an inch thick" (R3.1407), solid leather and covers the mouth, extending from the chin to the bottom of the nose (Pet. Ex. 1-I).[20] In Mr. Davis' execution, Hackle pulled the mouth strap "tight" (R3.318, 320). Before the mouth strap is applied, Warden Crosby asks the condemned for a last statement, because after the mouth strap is applied, the person is unable to speak (R3.1362-63).

The way the mouth strap was placed on Davis is the way it has been done in all other Florida executions (R3.340).[21] The State stipulated that the mouth straps used in other executions were the "same in design, purpose and function" as that used on Davis (R3.74, 86-87). Thomas agreed with the court that the mouth strap was

---

[19] Witnesses have referred to Petitioner's Exhibit 5 as either the mouthpiece, mouth strap or chin strap. To avoid confusion, this device will be referred to in this brief as the mouth strap.

[20] *See Provenzano*, slip op. at 48 (Shaw, J., dissenting) ("[W]hen Davis was being strapped into the chair, guards placed a solid leather mouth-strap across his mouth and nose area. This mouth-strap is wide – approximately five inches from top to bottom – and it covered the entire lower portion of Davis' face from the bottom of his chin to immediately below his nose. The strap was fastened so tightly against his face and was so wide that it pushed his nose severely upward, blocking his nostrils at least partially. A heavy fabric face-mask was placed on top of this apparatus, further occluding his airway. And then . . . blood began flowing from his nose prior to electrocution. This too obstructed his nostrils.").

[21] Walter Zant, former Georgia death row warden, testified that in Georgia a condemned person's head is affixed to the electric chair by means of a chin strap similar to that found on a football helmet (R3.1292). This strap does not, like Florida's, cover the person's mouth, and it does not obstruct the person's ability to breathe (R3.1299, 1303).

tightened as in Petitioner's Ex. 1-I, which shows "the mask covering his mouth is so tight against, it's pushing the nose up to the side, and the blood is then coming directly down on the strap" (R3.328). The autopsy reports on the deaths of Jesse Tafero and Theodore Bundy note the presence of strap mark impressions on the face and ankles (R3.1852, 2017, 2019).

After the mouth strap is in place, the headpiece is put on (R3.320; Pet. Ex. 7).[22] The headpiece mask covers the condemned's face as soon as the device is put on the head, so when its chin strap is being tightened and thereafter, no one but Thomas can see the condemned's face (R3.354, 360, 819, 834, 838, 1033). The chin strap of the headpiece is positioned and tightened on top of the previously attached mouth strap (R3.834, Pet. Ex. 1). Thus, tightening this chin strap affects the tightness and position of the mouth strap (R3. Pet. Ex. 1). Thomas fastens this chin strap "tight" (R3.323). According to Crosby, the chin strap is to be pulled "snug," but he "would not expect it to be pulled as tight as it could be pulled" (R3.1365): "If you pull that thing as hard as you could, you're liable to choke him or break his jaw or something" (R3.1366).

Between the time when the mouth strap was secured to Mr. Davis and the tightening of the chin strap, ten to twenty seconds elapsed (R3.324). After the chin strap is tightened, Hackle attaches the electrical circuitry to the headpiece (R3.325). This took about twenty seconds in Mr. Davis' execution (R3.325).

---

[22] The headpiece consists of the head electrode, a fabric mask which conceals the condemned person's face, and a chin strap (*See* R3. Pet. Ex. 7).

John Moser watched the clock in the execution chamber as the Davis execution progressed (R3.153-54). When all the apparatus had been affixed, the clock showed 7:05 (R3.162). There was a lull in activity; then at 7:10, Davis' body tensed (R3.162). Closer to 7:10 than to 7:05, Moser heard "two distinct . . . screams" from Davis (R3.162-63).

Thomas noticed blood coming from Davis' left nostril before the current was turned on (R3.326-27, 332). Thomas did not alert anyone that Davis was bleeding (R3.329-30). Victor Seryutin, the attending physician at the Davis execution, has attended five or six executions (R3.297-98). His responsibility at an execution is solely to certify death (R3.298; *see also* R3.1368). When he saw Davis bleeding after the electricity was engaged, Seryutin had no responsibility to take any action to stop the execution or to treat Davis (R3.298). Seryutin believed the bleeding was caused by the tightness of the mouth strap breaking small blood vessels or by Davis struggling to breathe (R3.299-300).

2. The risk of pain from the mouth strap

Provenzano's witness Robert Kirschner, a forensic pathologist, performed an autopsy on Allen Davis (R3.733). The examination disclosed petechial hemorrhages, which are "small pinpoint bleeding sites or hemorrhages that were present around the eyes, on the eyelids and . . . in the eye on the sclera" (R3.741, 742-43). Such hemorrhages "are frequently associated with asphyxiation" (R3.741, 743-44), which results from "lack of oxygen, either due to inability to breathe or to some obstruction of the airways, either externally or internally" (R3.741).

Based upon the position of the mouth strap pushing against Mr. Davis' nose and occluding his mouth and

upon the presence of petechial hemorrhages, Kirschner formed the opinion that Davis was suffering partial asphyxiation before current was applied (R3.747-48, 752) and that Davis "was suffering from conscious pain during that period of asphyxiation, the pain being that of air hunger, which is a very powerful reflex, and a feeling of suffocation is what is occurring" (R3.758).[23]

In rebuttal, Respondent presented Kris Sperry, a forensic pathologist who observed Kirschner's autopsy of Davis (R3.852). Sperry and Kirschner agreed that the bleeding came from the left nasal cavity (R3.857). Sperry did not dispute that petechiae were present in the numbers and distribution Kirschner described (R3.918), and he agreed that photographs of Davis show congestion on his face, chin and neck (R3.866-67). (Congestion means that the blood vessels are filled with blood (R3.866), and does not occur after death (R3.867).[24]) Sperry explained the congestion as resulting from Davis holding his breath (R3.927-28, 989): "obviously with the mouth strap on, he could not breathe through his mouth, but the nostrils are unoccluded" (R3.994; *see* Pet. Ex.

---

[23] Rabbani Muhammed witnessed the 1998 execution of Leo Jones (R3.111-12). The mouth strap applied to Jones was similar to the one used in the Davis execution. (R3.114). In Jones' case the strap was "tied very tightly. I could see his – the flesh bulge from the tightness of the strap" (R3.117). Muhammed had earlier instructed Jones to signal if he could not breathe (R3.118-19). After all the apparatus was applied, Muhammed saw Jones moving his pinky finger up and down, which indicated to Muhammed that Jones was unable to breathe (R3.120, 142-43).

[24] Respondent's witness William Hamilton, a forensic pathologist who also performed an autopsy on Davis, believed the electric current caused the nose bleed (R3.1076, 1118).

1-I).[25] Sperry could not say to what extent the mouth strap might have caused pain or discomfort (R3.995).

Donald Price, the neurophysiologist and psychologist mentioned earlier, testified that, in his opinion, Davis did experience pain before the application of the electric current. In Price's field, scientists have developed a system of measuring the severity of pain by looking at facial expression and have determined that facial expressions of pain are distinct from facial expressions of other emotions (R3.454, 464).[26] Price testified that photographs of Davis show facial expressions which are "distinct signs of pain" (R3.456-57; Pet. Ex. 1-I, 1-F, 1-H, 1-G, 1-E), in that Davis' eyelids and the muscles around the eyelids are tightened, the cheek area below his eyelids is elevated, the muscles at the top of his nose between the eyes are wrinkled, his jaw has dropped, and it is likely his mouth is open (R3.458). Price concluded that Davis "almost certainly experienced intense or severe pain" (R3.466), resulting either from the straps or the effects of electricity (R3.424).[27]

---

[25] The court pointed out to Sperry that photographs show the mouth strap is "pushing up under the nose to the point that the nose is crimped up in there, plus the chin strap is in place. It shows the blood bleeding straight down on top of the strap under his nose" (R3.1004). Sperry testified that the position of the strap and the fact that the blood came down over the strap had no significance "[a]s far as the bleeding being caused by the placement of that strap" but that the bleeding was "spontaneous" (R3.1004-06).

[26] Particular facial motions indicating pain are: a tightening of the eyes, an elevation of the cheek area, a wrinkling of the muscles at the top of the nose between the two eyes, a downward turn of the mouth, and a dropping of the jaw or mouth opening (R3.454-55).

[27] The State presented no rebuttal to Price's testimony on the facial expressions of pain. As noted above, the findings of

SUMMARY OF THE ARGUMENT

This Court has held repeatedly that the Eighth Amendment's prohibition of Cruel and Unusual Punishments must be interpreted in the light of contemporary knowledge, considering currently available alternatives, and respecting society's evolving standards of decency. It has also held that the Eighth Amendment requires that a state's procedures for inflicting the death penalty must be reasonably regulated to avoid unnecessary and unacceptable degrees of risk that the penalty will be applied in disregard of basic human dignity.

The constitutional analysis conducted by a majority of the state supreme court in upholding Florida's electrocution procedures deviates from these Eighth Amendment principles in several crucial regards. The Florida Supreme Court majority did not consider whether the procedure, on the evidence developed in this record, creates a continuing, uncontrollable risk of physical pain which is intolerable to contemporary standards of decency. Plainly it does, in a time when the alternative of lethal injection has become available and widely used – and when, indeed, all but four of the twenty-six state jurisdictions that at one time used electrocution as their only mode of execution have abandoned that practice. The Florida Supreme Court majority also put wholly out of account the psychological torment, agonizing uncertainty, and barbaric disfigurement of its electrocution procedure, all of which profoundly offend the core values of the Eighth Amendment.

---

the trial judge were that Mr. Davis did not *die* of asphyxiation, and that he died instantaneously *once the current was applied.*

ARGUMENT

A. INTRODUCTION: THE GOVERNING EIGHTH AMENDMENT STANDARDS

"At the beginning of the nineteenth century . . . , the great spectacle of physical punishment disappeared; the tortured body was avoided; the theatrical representation of pain was excluded from punishment."[28] This case involves a reversion to the penal style of the preceding era, the epoque of "torture as a public spectacle."[29] It therefore implicates the original concerns of the Cruel and Unusual Punishments Clause.[30]

But the Eighth Amendment "proscribes more than physically barbarous punishments." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). It prohibits punishments that "involve the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). "Among 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.' " *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Gregg*, 428 U.S. at 183; citing *Gamble*, 429 U.S. at 103).

The pain inflicted need not be physical. The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict[ ] bodily pain or mutilation." *Weems v. United States*, 217 U.S. 349, 373 (1910). It forbids

---

[28] MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 14 (Alan Sheridan trans., Vintage Books 2d ed. 1995).

[29] *Id.* at 7. *See also* R. J. EVANS, *RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY 1600-1987* (Oxford University Press 1996).

[30] *See, e.g.*, A. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839 (1969); R. Durham, *THE CRUEL AND UNUSUAL PUNISHMENT AND EXCESSIVE FINES CLAUSES*, 26 AM. CRIM. L. REV. 1617 (1989).

laws subjecting a person to "circumstance[s] of degradation," *id.* at 366,[31] or to "circumstances of *terror*, pain, *or disgrace*" "superadded" to a sentence of death. *Id.* at 370 (emphasis supplied).[32] *See also Trop v. Dulles*, 356 U.S. 86, 101-102 (1958) (condemning punitive denationalization: "There may be involved no physical mistreatment, no primitive torture," but the destruction of political existence entailing a "fate of ever-increasing fear and distress" offends the Amendment).[33]

"[T]his Court has 'not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner.' " *Stanford v. Kentucky*, 492

---

[31] *See also Hudson v. McMillian*, 503 U.S. 1, 26 (1992) ("That is not to say that the injury [violating the Eighth Amendment] must be, or always will be, physical.") (Thomas, J., dissenting).

[32] *Cf. In re Medley*, 134 U.S. 160, 171, 172 (1890) (seclusion in solitary confinement and prohibition on telling condemned prisoner date and time of his execution are increased punishments, in violation of *ex post facto* clause, because solitary induces "further terror," while "secrecy [about the time of execution] must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment.").

[33] *See Hudson v. McMillian*, 503 U.S. 1, 16-17 (1992) (Blackmun, J., concurring): "As the Court makes clear, the Eighth Amendment prohibits the unnecessary and wanton infliction of 'pain,' rather than 'injury.' . . . 'Pain' in its ordinary meaning surely includes a notion of psychological harm. . . . I have no doubt that to read a 'physical pain' or 'physical injury' requirement into the Eighth Amendment would be no less pernicious and without foundation than the 'significant injury' requirement we reject today."

U.S. 361, 369 (1989) (quoting *Gregg*, 428 U.S. at 171).[34] Eighth Amendment adjudication is "dynamic" in three important senses. *First*, the punishment must be judged "in light of contemporary human knowledge." *Robinson v. California*, 370 U.S. 660, 666 (1962).[35] *Second*, the cruelty and gratuity of a mode of punishment must be judged in comparison to *currently* available alternatives. *Furman v. Georgia*, 408 U.S. 238, 430 (1972) (Powell, J., dissenting) ("[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.") *Third*, assessments of what is "cruel" and "unusual" must necessarily refer to the "evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. Thus, punishments "that transgress today's ' "broad and idealistic concepts of dignity, civilized standards, humanity, and decency" ' " violate the Amendment. *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (quoting *Gamble*, 429 U.S. at 102, quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)). This is why the Court has invalidated punishments repudiated by contemporary perceptions of

---

[34] "But surely they [the framers of the Eighth Amendment] intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation." *Weems*, 217 U.S. at 372.

[35] As Justice Souter stated in his opinion respecting the denial of certiorari in *Poyner v. Murray*, 508 U.S. 931 (1993), "the holding [in *Kemmler*] does not constitute a dispositive response to litigation of the issue [of the constitutionality of electrocution] in light of modern knowledge about the methods of execution."

appropriate proportion, as reflected by objective indicia[36] such as the consensus of considered American legislative judgment. *See, e.g., Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982). "But . . . public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty must also accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' " *Gregg*, 428 U.S. at 173 (citing *Trop*, 356 U.S. at 100).

Since *Furman v. Georgia*, 408 U.S. 238 (1972), this Court has repeatedly applied these principles to state-created systems for administering the punishment of death. It has found the death penalty *per se* constitutionally unobjectionable, but has insisted that the procedures for inflicting it be reasonably regulated with an eye to controlling against unacceptable degrees of risk that the penalty will be applied in disregard of basic human dignity. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (speaking of the "risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty" and holding that "such risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (speaking of the "risk of an unwarranted conviction" and holding that "[s]uch a risk cannot be tolerated in a case in which the defendant's life is at stake"). In capital cases as in others, the teaching of the Court's cases is that Eighth Amendment adjudication cannot proceed primarily by correcting ugly but isolated

---

[36] *See Stanford*, 492 U.S. at 370; *Ford v. Wainwright*, 477 U.S. 399, 408-410 (1986); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

instances of deviation from generally acceptable standards of procedure; rather, it must be concerned with assuring that general procedures themselves are adequately designed and maintained to avoid undue risks of inflicting inhumane punishments. *Compare Maynard v. Cartwright*, 486 U.S. 356 (1988), *with Lewis v. Jeffers*, 497 U.S. 764 (1990).[37]

B. THE FLORIDA SUPREME COURT HAS DISREGARDED PROPER EIGHTH AMENDMENT ANALYSIS AND AN INTOLERABLE RISK OF PHYSICAL PAIN

The *per curiam* majority opinion upholding Florida's electrocution procedure in *Provenzano* nowhere addresses the constitutionally critical question whether that procedure involves an unacceptable, needless *risk* of physically painful death. It recites that "[t]he record in this case reveals abundant evidence that execution by electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain." *Provenzano v. Moore*, slip op. at 3-4. But it does not mention that the record also contains abundant evidence to the contrary – evidence that an inmate can suffer intense pain before unconsciousness occurs (*see* pages 15-24 *supra*) – and it does not explain how or why or by what measure the former evidence is to be regarded as more satisfying than the latter. It refers only to Florida's customary "competent, substantial evidence" standard for appellate review

---

[37] *Accord*: *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (Eighth Amendment analysis "requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency"); *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (the focus of the inquiry is whether there exists an "objectively intolerable risk of harm").

of findings of historical fact, slip op. 4, a reference that is wide of the constitutional mark for two related reasons. *First*, the pertinent Eighth Amendment question is not one of historical fact (what happened on a specific occasion) or even of simple actuarial probability ("a scientific and statistical inquiry into the . . . likelihood that . . . injury . . . will actually be caused"); it is whether "society considers the risk . . . [of the injury] so grave that it violates contemporary standards of decency," *Helling v. McKinney*, 509 U.S. 25, 36 (1993). *Second*, the trial court in *Provenzano* made no factual findings except about what happened on the single occasion of Allen Davis' execution, and it made those findings "by the greater weight of the evidence." (R3.2297).[38] To say that there was competent, substantial evidence to support a finding that (more

---

[38] The trial court made six factual findings relating to the Davis execution: that, on that occasion, (1) the electric chair functioned as it was supposed to function; (2) DOC protocol was followed; (3) Davis's "death . . . did not result from asphyxiation caused by the mouth strap"; (4) Davis "did not suffer any conscious pain" but "suffered instantaneous and painless death once the current was applied to him"; (5) his nose bleed was of unknown origin but started before the electric current; and (6) the mouth and chin straps "may have caused Davis to suffer some discomfort" but not "unnecessary and wanton pain" (and "the mouth strap was not a part of the electrical operation of the electric chair."). It made a seventh finding that a different sort of mouth strap might be preferable; and an eighth finding as follows: "Execution inherently involves fear, and it may involve some degree of pain. That pain may include pain associated with affixing straps around the head and body to secure the head and body [to] the electric chair. However, any pain associated therewith is necessary to ensure that the integrity of the execution process is maintained." *State v. Provenzano*, slip op. at 32, quoted in *Provenzano v. Moore*, slip op. at 2-3.

probably than not) the application of electric current to Allen Davis on July 8, 1999 killed him instantly and without conscious physical pain falls far short of addressing the question whether electrocution – which passes through different human bodies differently on different occasions (*see* pages 18-20 and n. 12 *supra*) – poses a risk of physical pain that "violates contemporary standards of decency."[39]

---

[39] In the earlier *Jones* hearing, the trial court made findings of fact – also based on "the greater weight of the evidence," (R2.1947) – that centered on the execution of Pedro Medina and the DOC's then-new electrocution protocol. It found that, despite the "malfunction[ ]" which occurred during Mr. Medina's execution, he "suffered no conscious pain"; that the same "can be said" for all future inmates who would be executed in Florida; that "Florida's electric chair – its apparatus, equipment, and electric circuitry – is in excellent condition"; that the "death chamber staff is qualified and competent to carry out executions"; that the new protocol for future executions would insure that "all executions in the electric chair will be carried out with the reasonable certainty of no future malfunctions"; and that "[a]ll inmates who will hereafter be executed in Florida's electric chair will suffer no conscious pain". *See Jones v. State*, 701 So. 2d at 77. The trial court's understanding of the scientific evidence presented in *Jones* was, however, so flawed on its face as to be patently unreliable. The court's holding that no conscious pain could be experienced relies in part on this explanation of how pain is experienced:

> "It is uncontroverted that the brain does not create pain impulses, but rather, pain impulses are created at the peripheral nerves. The pain message is transmitted through the nerves to the spinal cord and then to the brain, which then perceives the pain message."

(R2.1956). Nothing in the record supports this extraordinary notion, and the testimony of expert witnesses for both sides confirms the well-understood phenomenon that sensations of

It is not only this Court's precedents, of course, that make the crucial Eighth Amendment question whether "that risk is unacceptable," *Lockett*, 438 U.S. at 605. Since the effects of an electrocution upon human sensation cannot be measured during the event[40] or reported by the subjects afterwards, risk and its acceptability are the only questions that can meaningfully be asked about the use of such a procedure, however frequently repeated. The failure of the Florida Supreme Court to consider that question requires, at the least, a reversal and remand for reconsideration under the correct constitutional standard.[41] *See, e.g., Stansbury v. California*, 511 U.S. 318 (1994); *Sochor v. Florida*, 504 U.S. 527 (1992). But, on the present record, we believe that this Court should resolve the question independently, *see, e.g., Haynes v. Washington*, 373 U.S. 503 (1963), because there is only one answer to it that is consistent with contemporary standards of decency.

There was a time when the unmeasurable hazards of electrocution were thought to be bearable – and, indeed,

---

pain *can* be produced by stimulating the regions of the brain which function to interpret pain. *See* pages 20-24 & n. 17 *supra* and the testimony of State's experts Wilder (R2.1019, 1034, 1046; R3.1167-1168) and Sperry (R2.951-953; R3.889-890, 892-893).

[40] *See* pages 15-16, *supra*.

[41] In his concurring opinion in *Provenzano*, slip op. at 10, Chief Justice Harding (joined by Justice Lewis) noted that "each time an execution is carried out, the courts wait in dread anticipation of some 'unforeseeable accident' " that will result in more litigation about the electric chair. Justice Quince, in her concurrence (joined by Justice Wells), observed that "human error . . . seems to plague this form of execution." *Id.* at 23. Yet none of the four justices considered these elements of risk in their analyses of whether electrocution was unconstitutionally cruel punishment.

a humane experiment – because of an apparent absence of alternatives. That was the view this Court took in *In re Kemmler*, 136 U.S. 436 (1890),[42] although *Kemmler*'s discussion of the subject was necessarily dictum because the Eighth Amendment was not then applicable to the States. Such a view was still tenable when the Court decided *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947), although that, too, was before the Eighth Amendment's incorporation into the Fourteenth.[43] But the advent of lethal injection – a mode of execution now used in the overwhelming majority of American jurisdictions that at one time used only electrocution – has made it unnecessary to tolerate the risks involved in discharging high-voltage electric current through the unpredictable pathways of the human body.[44] To continue to accept those risks, a gamble now deprived of any " 'legitimate penological objectiv[e],' " *Farmer v. Brennan*, 511 U.S. 825,

---

[42] The Court in *Kemmler* quoted from a New York state legislative commission report describing electrocution as "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." *Id.* at 444.

[43] Justice Frankfurter's decisive vote in *Francis* was explicitly based upon the theory, later overthrown by *Robinson v. California*, 370 U.S. 660 (1962), that Eighth Amendment standards did not bind the States. *See* 329 U.S. at 470.

[44] *See* pages 17-27, *supra*. The evidence in this record is consistent with the professional literature in suggesting that – to an extent undreamed of in the *Kemmler* era – the human body may react to electrical current in ways that are designed to preserve life and consciousness, if only briefly, and that during that life-preserving biological reaction significant pain and suffering may be experienced. *See* the literature collected in D. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 William and Mary L. Rev. 551, 633-642 (1994).

833 (1994), is unconscionable. And to *compound* the risks, as Florida does, by strapping its condemned inmates to the chair in a fashion serving simply to add asphyxiation to the hazard, is a travesty of decency equalled solely, in this century, by the grotesque execution machine in Kafka's *In the Penal Colony*.

C. THE FLORIDA SUPREME COURT HAS DISREGARDED ITS OBLIGATION TO CONSIDER THE PSYCHOLOGICAL TORMENT, INDIGNITY AND BARBARIC DISFIGUREMENT INFLICTED BY ITS ELECTROCUTION PROCEDURE

By its orders limiting the scope of the evidentiary hearings conducted in the *Jones* and *Provenzano* cases and by the majority's single-minded focus upon physical pain in its ultimate *Provenzano* decision, the Florida Supreme Court excluded from its Eighth Amendment analysis three additional considerations that render Florida's electrocution procedure abhorrent to the Constitution:

1. Florida's procedure involves exquisite mental cruelty

It is difficult to imagine an execution procedure more dramatically designed than Florida's to deny condemned inmates death with dignity. The stark terror and incomprehensibility of the gruesome spectacles that have repeatedly occurred in Florida's electrocution chamber – and that have not ceased despite the sanguine finding of the trial court in *Jones* that "all executions in the electric chair will be carried out with the reasonable certainty of no future malfunctions"[45] – make it impossible for the condemned to invest his or her death with any shred of

---

[45] *See* note 39 *supra*.

apperceptible meaning. That the most horrifying of the spectacles occur (or are reported) only irregularly does not make their apprehension easier to bear. *See* pages 14-15 *supra*; 49-51 *infra*.

Psychological science seconds the common sense human intuition that the anticipation of pain can exacerbate the suffering of pain.[46] Psychological understanding of the mechanisms people use to cope with the anticipation of death from illness[47] is instructive with respect to the experience of persons waiting to be executed by the state. It teaches us that condemned inmates like Anthony Bryan will attempt to prepare psychologically for their executions. They will attempt to make sense of their impending deaths; they will spend time contemplating what is about to happen, harnessing whatever psychological and emotional resources they have available to withstand the fate they know awaits them. Like others for whom death is imminent,[48] condemned inmates

---

[46] A. Ploughaus, I. Tracey, S. Clare, *et al.*, *Dissociating Pain from its Anticipation in the Human Brain*, 284 SCIENCE (No. 5422) 1979 (1999). As one researcher has noted: "Even the suffering associated with losses from past events [emphasizes its anticipatory nature] . . . because the suffering person is forced to anticipate the effects of the losses on his or her present and future." W. Fordyce, *Pain and Suffering: A Reappraisal*, 43 AMER. PSYCHOLOGIST 276, 278 (1988).

[47] *See, e.g.*, E. Kubler-Ross, *ON DEATH AND DYING* (Macmillan 1969); E. Kubler-Ross, *The Languages of Dying Patients*, 10 HUMANITAS 5 (1974).

[48] *See, e.g.*, J. Arndt, J. Greenberg, S. Solomon, T. Pyszczynski & L. Simon, *Suppression, Accessibility of Death-Related Thoughts, and Cultural Worldview Defense: Exploring the Psychodynamics of Terror Management*, 73 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 5 (1997); T. Pyszczynski, J. Greenberg & S. Solomon, *A Dual Process Model of Defense Against Conscious*

experience anticipatory fear of dying, and this is an emotion that they struggle to overcome and manage.[49]

But Anthony Bryan and others condemned to death in Florida face more than simple pain and the loss of their lives. They face extinction by a process that is unpredictable and potentially painful, in which their bodies and particularly their faces and genitalia may be disfigured, and their deaths rendered a humiliating public spectacle. These aspects of the process by which they will die make their ability to cope with death overwhelmingly difficult – beyond the ordinary difficulty of facing death.

When one sits in a cell for years with little to occupy one's thoughts except to ready oneself for death, the manner of one's dying comes to have a special place in one's imagination. The essence of the Florida execution procedure, made notorious by repeated terrifying exhibitions, is to deprive the condemned man or woman of the capacity to hope that he or she can face what is to come with any solace of acceptance or redeeming courage.[50] Like raw physical pain, whose greatest horror is that it is mentally ungraspable, being put to death as Florida inflicts death is a prospect that cannot be made intelligible by the person who will suffer it. Demeaning and

---

and Unconscious Death-Related Thoughts: An Extension of Terror Management Theory, 106 PSYCHOLOGICAL REVIEW 835 (1999).

[49] *See* C. Haney, *Psychological Secrecy and the Death Penalty: Observations on "The Mere Extinguishment of Life,"* 16 STUDIES IN LAW, POLITICS AND SOCIETY 3 (1996).

[50] As Ernest Becker observed in his classic work: "We admire the courage to face death; we give such valor our highest and most constant adoration; it moves us deeply in our hearts because we have doubts about how brave we ourselves would be." E. BECKER, *THE DENIAL OF DEATH* 11-12 (Free Press paperback ed. 1997)

repulsive, gratuitously hideous, it defies assimilation in any of the ways through which the human mind and will can make destruction bearable – by explaining it, or alleviating it, or dignifying it, or otherwise putting it into a coherent frame of reference that allows something of worth and value and *sense* to coexist with death and to survive despite it. The culminating insult is that all Florida inmates are required to be sane enough to contemplate what sanity can only gibber at.[51]

2. Florida's procedure adds the horror of uncertainty

One of the early purported advantages of using electrocution for state-sanctioned executions was its alleged reliability.[52] Reliability or predictability is an important dimension of humane treatment. Knowledge about the nature of the process by which death will come has been found to assist what therapists have described as the

---

[51] *See Ford v. Wainwright*, 477 U.S. 399, 409 (1986): "[T]he natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today."

[52] The advantages of electrocution were said to be the reduction of suffering of the condemned, elimination of the unpredictability that sometimes accompanied the less effective and more inefficient method of execution then commonly in use (hanging), and – because of the promise of instantaneous and apparently painless death – a significant moderation in the spectacle of the execution itself. No less a scientific figure than Thomas Edison was called upon by New York to provide support for this untried method of execution, and he confidently opined that it "would kill instantly, painlessly, and in every case." Quoted in L. Hoffman, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 TEXAS L. REV. 1039, 1043 (1992).

"death anxiety"[53] or "terror management" that surrounds death by decreasing the profound fear that people associate with their impending demise.[54] Conversely, unpredictability and unreliability are hallmarks of cruel punishment. Introducing unpredictability into the process of administering pain is a favored practice of torturers who, by doing so, seek to intensify the fear their actions generate and the suffering it inflicts.[55] Thus, the unpredictability of events clearly adds to their painful quality.[56] A century's worth of experience with the electric chair, and not just the events of the last decade in

---

[53] R.A. Neimeyer & D. Van Brunt, "Death Anxiety," in H. Wass, R. Neimeyer *et al.*, eds., *Dying: Facing the Facts* 49-88 (3d ed., Taylor and Francis 1995); R. Neimeyer, ed., *Death Anxiety Handbook: Research, Instrumentation, and Application* (Taylor and Francis 1994).

[54] C. Abengozar, B. Bueno & J. Vega, *Intervention on Attitudes toward Death along the Life Span*, 25 Educational Gerontology 435 (1999).

[55] *See, e.g.*, M. Basoglu & S. Mineka, "The Role of Uncontrollable and Unpredictable Stress in Post-traumatic Stress Responses in Torture Survivors," in *Torture and Its Consequences: Current Treatment Approaches* 182-225 (Cambridge University Press 1992). *And see* A. Koestler, *Darkness at Noon* (Macmillan 1941).

[56] *E.g.*, T. Pyszczynski, J. Greenberg, & S. Solomon, "A Terror Management Perspective on the Psychology of Control: Controlling the Uncontrollable," in M. Kofta, G. Weary, *et al.*, eds., *Personal Control in Action: Cognitive and Motivational Mechanisms* 85-108 (Plenum Press 1998); V. Florian & M. Mikulincer, *Fear of Death and the Judgment of Social Transgressions: A Multidimensional Test of Terror Management Theory*, 73 Journal of Personality and Social Psychology 369 (1997). Terror management is facilitated by the belief that future death-related events will be orderly and predictable. J. Lieberman, *Terror Management, Illusory Correlation, and Perceptions of Minority Groups*, 21 Basic and Applied Social Psychology 13 (1999).

Florida, suggests that it is fraught with uncertainty. As one historian recently concluded:

> "Many [executions by electrocution], like Kemmler's, were botched when the electrodes were not tight enough, when a sponge was allowed to dry out or even when the wires were installed incorrectly. In many of these cases the victim dies a slow and agonizing death rather than the quick and efficient 'electric euthanasia' the inventors of the electric chair had hoped to provide."[57]

As this Court recognized more than a hundred years ago, uncertainty about the time of one's execution "must be accompanied by an immense mental anxiety amounting to a great increase in punishment." *In re Medley*, 134 U.S. 160, 171, 172 (1890). Uncertainty as to whether one will die like Jesse Tafero or Pedro Medina or Allen Lee Davis is no less agonizing.

3. The prospect of disfigurement enhances the atrocity

Another supposed advantage of electrocution when it was introduced as a means of execution a century ago was that it seemed to offer a scientific solution to the problem of disfiguring spectacles that plagued beheading and hanging. A *New York Herald* editorial published in 1884 calling for an end to the gallows reflected this view: "Science stands ready to provide Justice with a number of perfectly expeditious, neat and non-disfiguring homicidal methods. It is quite easy to devise a plan by which the death of a murderer would be instantaneous, and into which neither the horrible nor the grotesque would

---

[57] C. Brandon, *The Electric Chair: An Unnatural American History* 205 (McFarland Publishers 1999).

enter."[58] But that promise has not been fulfilled.[59] According to the Florida Department of Corrections, "most executions last longer than seven minutes." *Buenoano v. State*, 565 So. 2d 309, 311 (Fla. 1990). During those more than seven minutes of electrical current waxing and waning, of clenched muscles, chest movements and sometimes moans, smoke, flames or blood, the prisoner's death is rendered a grisly spectacle.[60]

Disfigurement is almost universally recognized as a form of profound degradation and humiliation.[61]

---

[58] *New York Herald*, August 10, 1884, quoted in Brandon, note 58 *supra*, at 39.

[59] There is research suggesting that electrocution is perceived as the second most painful form of judicial execution, next only to stoning to death. M. Patarelli & J. Bishop, *Perceptions of Estimated Pain Experienced During Execution: Effects of Gender and Belief in Capital Punishment*, 38 Omega: Journal of Death and Dying 103 (1998-99).

[60] Across the country, news reports of recently botched executions in Florida have included accounts that witnesses were "sickened" by what they saw. *See, e.g., Grisly Execution in Electric Chair Sickens Witnesses, Flames Shoot from Convict's Head as Florida Murderer is Put to Death*, San Jose Mercury News 1A (March 26, 1997). Newspapers as far away as Ireland carried headlines like "Electric chair sparks another grisly scene" when they reported on the bloody execution of Allen Davis. David Sapsted, *Electric Chair Sparks Another Grisly Scene*, Irish Independent 28 (July 9, 1999).

[61] "When William Hogarth engraved, in 1751, the grim series entitled *The Four Stages of Cruelty*, he mapped the moral sequence that begins with boys tormenting animals and leads to rape and murder. In the final macabre image, *The Reward of Cruelty*, the perpetrator has finished up a ghastly shrieking corpse on a surgical dissection table, his innards rummaged by doctors and spilling in profusion on to the floor and into pails, his bones in the anatomist's cauldron, while on the operating theatre walls are suspended the skeletons of criminals who have

Disfigurement of the dead is condemned by virtually every culture.[62] It was a common-law crime and is now commonly punished by statute.[63] In times of political upheaval, opposing factions sometimes use disfigurement and mutilation of the dead to terrorize and humiliate their opponents. Conversely, most cultures have elaborate burial rituals that scrupulously provide for the careful preservation of the physical integrity of the dead. Preservation of the physical integrity of the dead is part of a deep-seated human need.[64] The threat of a disfiguring death instills intense distress.

Physical mutilation is cited among the atrocities forbidden in this Court's early cases. *See, e.g., Weems v. United States*, 217 U.S. at 372 ("there could be exercises of cruelty by laws other than those which inflicted bodily pain *or mutilation*"); *Wilkerson v. Utah*, 99 U.S. 130, 135 (1879) (citing drawing, beheading, quartering and public dissection as punishments forbidden by the Eighth Amendment). Indeed, the State conceded in the *Provenzano* case that death by guillotine would violate the Eighth Amendment, even though probably instantaneous and painless, because of its disfiguring of the executed

---

preceded him under the scalpel." MARINA WARNER, *NO GO THE BOGEYMAN: SCARING, LULLING AND MAKING MOCK* 133-134 (Farrar, Strauss and Giroux 1998).

[62] *See generally* E. BENDANN, *DEATH CUSTOMS* 45-56, 83-89 (Knopf 1930) (comparing several cultures' attitudes and practices regarding death).

[63] *See* John S. Herbrand, *Validity, Construction, and Application of Statutes Making It A Criminal Offense to Mistreat or Wrongfully Dispose of Dead Body*, 81 A.L.R. 3d 1071 (1977).

[64] This is why the disinterment and dissection of corpses has been a constant subject of horror and a staple of classic horror tales like Robert Louis Stevenson's *The Body Snatcher*.

person. *Provenzano v. Moore*, slip op. at 79 (Pariente, J., dissenting).

Disfigurement and degradation are abhorred, moreover, because they represent ancient forms of power in which one's body was not one's own, but belonged to the "divine" King to dispose of at his whim.[65] It was in part in reaction to this limitless power of the Sovereign to trespass on an individual's right to his or her own bodily integrity that prohibitions against cruel and unusual punishment were erected. These prohibitions stand to limit not only government's power to inflict pain, but government's power to deform the very physical being of its citizens. That is why, among the "rules of government which . . . have [been] found to be essential to the preservation of those great principles of liberty and law . . . was that which prohibited the infliction of cruel and unusual punishment." *Weems*, 217 U.S. at 367-368.

4. Florida's method of electrocution is an atavistic barbarism

Kemmler gave the States 100 years to experiment with methods of conducting executions by electrocution. Untried when *Kemmler* was decided in 1890, electrocution subsequently came to be the only mode of execution used in more than half the States of the United States. That number now has dwindled from 26 to 4, not by happenstance but through humanity. Not a single jurisdiction in the world outside of the United States practices judicial electrocution. Yet in the State of Florida it continues to be practiced under circumstances that increase its visible

---

[65] *See* M. FOUCAULT, *op. cit. supra* note 28.

brutality. So practiced, it is a gratuitous affront to universal standards of contemporary decency and violates the Eighth Amendment.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

GREGORY C. SMITH, ESQ.*
ANDREW THOMAS, ESQ.
CAPITAL COLLATERAL COUNSEL
NORTHERN REGION
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(850) 488-7200

MARTIN MCCLAIN, ESQ.
GAIL ANDERSON, ESQ.
Special Assistant CCRC-N

(32)

Supreme Court, U.S.
FILED
DEC 15 1999
CLERK

No. 99-6723

In The

Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

vs.

MICHAEL MOORE, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Florida

JOINT APPENDIX

GREGORY C. SMITH*
Capital Collateral Counsel
Northern Region
Post Office Drawer 5498
Tallahassee, Florida 32314
(850) 488-7200
Counsel for Petitioner

* *Counsel of Record*

RICHARD B. MARTELL*
Chief, Capital Appeals
Office of the
Attorney General
The Capitol
Tallahassee, Florida 32399
(850) 414-3300
Counsel for Respondent

Petition For Certiorari Filed October 21, 1999
Certiorari Granted October 26, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Photos of Allen Lee Davis 3

FSC Order in *Bryan v. Moore*, Case No. 96,678 (Oct. 20, 1999) 6

Order Regarding Petitioner's "Amended Petition for Writ of Habeas Corpus and Petition to Invoke This Court's All Writs Jurisdiction and Petition for Extraordinary Relief" (August 2, 1999) 7

Provenzano v. Moore, Case No. 95,973 (Sept. 24, 1999) 47

Excerpt from *Provenzano* Evidentiary Hearing – John Wikswo, Ph.D. 133

Execution Methods Used by States, Supplemental Report, Florida Corrections Commission (June 1997) 144

Order from United States Supreme Court Granting Motion for Leave to Proceed In Forma Pauperis 239

RELEVANT DOCKET ENTRIES

5/4/90	Jesse Tafero is executed in Florida's electric chair
6/20/90	Judias Buenoano's challenge to Florida's electric chair based upon the Tafero execution rejected by 4-3 vote of Florida Supreme Court in *Buenoano v. State*, 565 So. 2d 309 (Fla. 1990)
3/25/97	Pedro Medina is executed in Florida's electric chair
4/10/97	Florida Supreme Court relinquishes jurisdiction to Circuit Court for evidentiary hearing on Leo Jones's All Writs Petition challenging continued use of Florida's electric chair in *Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997)
10/20/97	Florida Supreme Court, by 4-3 vote, affirms Circuit Court's opinion upholding constitutionality of continued use of Florida's electric chair in *Jones v. State*, 701 So. 2d 76 (Fla. 1997)
7/8/99	Allen Lee Davis is executed in Florida's electric chair
7/8/99	Thomas Provenzano files All Writs Petition in Florida Supreme Court, challenging continued use of Florida's electric chair
7/8/99	Florida Supreme Court enters Order (Case Nos. 95,959 & 95,973) allowing amendment of All Writs Petition, relinquishing jurisdiction to Circuit Court for evidentiary hearing, and appointing Senior Circuit Judge Clarence T. Johnson, Jr., to preside
8/2/99	Senior Circuit Judge Johnson's Order finding continued use of Florida's electric chair constitutional

9/24/99 Florida Supreme Court, by 4-3 vote, affirms Judge Johnson's Order in *Provenzano v. Moore*, ___ So. 2d ___, 1999 WL 756012 (Fla. Sept. 24, 1999)

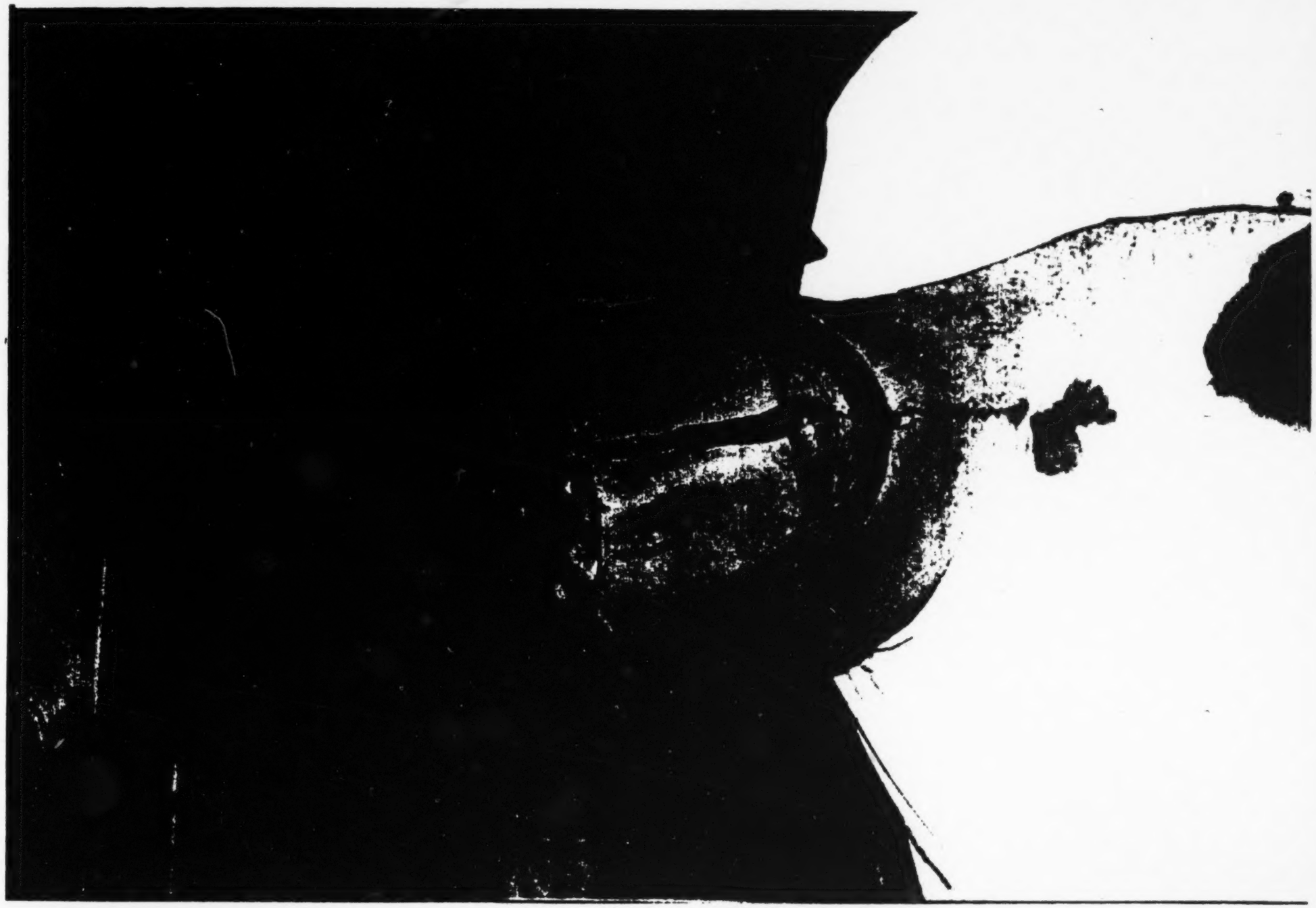
10/5/99 Anthony Braden Bryan files Petition Seeking to Invoke All Writs Jurisdiction of Florida Supreme Court, files a Petition for Extraordinary Relief, and files Motion to Adopt Record and/or Take Judicial Notice of prior proceedings challenging use of Florida's electric chair

10/20/99 Anthony Braden Bryan's Petitions are denied; Florida Supreme Court grants the Motion to Adopt and/or Take Judicial Notice of prior proceedings

10/21/99 Anthony Braden Bryan files his Petition for Writ of Certiorari with the Supreme Court of the United States

10/26/99 Anthony Braden Bryan's Petition for Writ of Certiorari is granted by the Supreme Court of the United States in *Bryan v. Moore*, 120 S.Ct. 394 (1999)

* * *



Supreme Court of Florida

WEDNESDAY, OCTOBER 20, 1999

ANTHONY BRADEN BRYAN,	*	
Petitioner,	*	
	*	
v.	*	CASE NO.
MICHAEL W. MOORE, etc.,	*	96,678
et al.,	*	
Respondents.	*	

****

The Petition Seeking to Invoke this Court's All-Writs Jurisdiction and Petition for Extraordinary Relief is denied.

Petitioner's Motion to Adopt Record and/or Take Judicial Notice is granted. HARDING, C.J., and SHAW, WELLS, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

NO MOTION FOR REHEARING WILL BE ALLOWED.

A True Copy
TEST

/s/ Debbie Causseaux
Debbie Causseaux
Acting Clerk,
Supreme Court

[SEAL]

TC

cc: Mr. Andrew Thomas
Mr. Richard B. Martell
Mr. Curtis Golden

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

THOMAS HARRISON PROVENZANO,

Defendant.

_____/

CASE NO.: CR84-835

THOMAS HARRISON PROVENZANO,

Petitioner,

vs.

MICHAEL W. MOORE, Secretary, Florida Department of Corrections, JAMES CROSBY, Superintendent, Florida State Prison, and STATE OF FLORIDA,

Respondents.

_____/

FLA. SUPREME CT. CASE NO.: 95,973

ORDER REGARDING PETITIONER'S "AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND PETITION TO INVOKE THIS COURT'S ALL WRITS JURISDICTION AND PETITION FOR EXTRAORDINARY RELIEF"

(August 2, 1999)

This matter came before this Court pursuant to the order of the Supreme Court of Florida dated July 8, 1999,

relinquishing jurisdiction over this matter and directing this Court "to hold an evidentiary hearing . . . on all issues in respect to the functioning of the electric chair" which were alleged in Petitioner, Thomas Harrison Provenzano's, "Petition for Writ of Habeas Corpus and Petition to Invoke this Court's All Writs Jurisdiction and Petition for Extraordinary Relief and Application for Stay of Execution" filed in the Supreme Court of Florida on July 8, 1999, and in any amended petition filed after that date. On July 22, 1999, Provenzano filed his "Amended Petition for Writ of Habeas Corpus and Petition to Invoke this Court's All Writs Jurisdiction and Petition for Extraordinary Relief" ("Amended Petition"). In the Amended Petition, six other death row inmates were added as petitioners without any attempt to intervene being made either in this Court or in the Florida Supreme Court. Since this Court was directed to hear the Provenzano matter and no others, and since no valid procedural route for intervention was followed, the joinder of Milford Wade Byrd, Eduardo Lopez, McArthur Breedlove, Jerry Haliburton, Gregory Kokal, and Tommy Groover was stricken.

On July 26, 1999, Respondents, Michael W. Moore, Secretary, Florida Department of Corrections, James Crosby, Superintendent, Florida State Prison, and the State of Florida, filed "State's Response to Amended Petition for Writ of Habeas Corpus and Petition to Invoke this Court's All Writs Jurisdiction and Petition for Extraordinary Relief."

On July 27, 1999, through July 30, 1999, this Court held an evidentiary hearing on this matter. At the evidentiary hearing, the testimony of thirty-three witnesses was

presented, and numerous exhibits were received in evidence, including photographs of Mr. Davis after his execution had been carried out but before he was removed from the electric chair. This Court has reviewed the testimony of the witnesses, has examined the exhibits and photographs, and has considered the argument of counsel and the law. Following that careful review and consideration, this Order is hereby entered.

PETITIONER'S ARGUMENTS

In his Petition and at the hearing on this matter, Provenzano raised two main arguments. Those arguments are:

CLAIM I

FLORIDA'S ELECTRIC CHAIR IN ITS PRESENT CONDITION CONSTITUTES CRUEL AND/OR UNUSUAL PUNISHMENT AND ITS USE FOR EXECUTION IS UNCONSTITUTIONAL BECAUSE IT DOES NOT RESULT IN INSTANT DEATH, CREATES A RISK OF PAIN, AND INFLICTS SEVERE MUTILATION ON THE BODY OF THE CONDEMNED PRISONER.

CLAIM II

FLORIDA'S CURRENT USE OF JUDICIAL ELECTROCUTION AS ITS SOLE METHOD OF EXECUTION IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY.

Further, within Claim I, Provenzano raises several sub-arguments. Those arguments are as follows. To begin with, Provenzano argues that the representations which

resulted in the factual finding that "Florida's electric chair – its apparatus, equipment, and electric circuitry – is in excellent condition," made by the trial court in *Jones v. Butterworth, et al.*, No. 81-4593-CF (Fla. 4th Cir. Ct. July 18, 1997), and the conclusion that "electrocution in Florida's electric chair in its present condition is not cruel or unusual punishment," made by the Supreme Court of Florida in *Jones v. State*, 701 So. 2d 76 (Fla. 1997), were incorrect, Provenzano argues, based upon newly discovered documents, that the condition of chair itself, as well as the electric circuitry was not in excellent condition as was represented in the *Jones* proceedings.

Second, Provenzano argues that the Department of Corrections ("DOC") has not been following, and in fact cannot follow, the Execution Day Procedures ("execution protocol") established in April 1997, as a result of the problems that occurred during the execution of Pedro Medina. Provenzano contends that the execution protocol was written in such a way that it cannot be followed because it does not account for the variations in resistance created by the different characteristics, i.e., weight, muscle tone, fat content, skeletal configuration, size, body build, etc., of each individual inmate's body.

Third, Provenzano argues that the testing of the electric chair is not being conducted in accordance with the Testing Procedures for Electric Chair ("testing protocol") established in, April 1997, as a result of the problems that occurred during the execution of Pedro Medina. He claims that the precise voltage and amperage requirements established in the testing protocol are not being used during the actual tests conducted on the electric chair.

Fourth, Provenzano argues that the resistance created by an inmate's body is different than the representations that were made during the *Jones* proceedings.

Fifth, Provenzano claims that death by electrocution in Florida's electric chair is not instantaneous or painless, and that he will suffer conscious pain because his brain will not immediately cease functioning once the electrical current is applied to him. Additionally, he claims he will suffer disfigurement and mutilation.

Sixth, Provenzano argues that the Florida Department of Corrections ("DOC") has exhibited indifference toward the inmates whom have been executed in the electric chair.

RESPONDENTS' ARGUMENTS

In Response to Provenzano's arguments, Respondents assert that the arguments raised in Provenzano's Amended Petition were previously raised and rejected in the *Jones* proceedings, and that execution by electrocution in Florida's electric chair is being, and will be carried out in the future, within constitutional parameters.

DISCUSSION

The issues of the constitutionality of the death penalty and death by electrocution are not at issue herein as both have previously been declared constitutional. *Gregg v. Georgia*, 428 U.S. 153, S. Ct. 2909, 49 L. Ed. 2d 340 (1976) (The death penalty does not violate the United States Constitution's Eighth Amendment prohibition against cruel and unusual punishment); *Proffit v. Florida*, 428 U.S.

242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976) (Florida's death penalty statute is constitutional); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 347, 91 L. Ed. 2d 422 (1947) (Death by electrocution is not cruel and unusual punishment); *Wilson v. State*, 225 So. 2d 321 (Fla. 1969) (Florida's death penalty statute is not cruel or unusual in violation of Article I, Section 17 of the Florida Constitution); *Booker v. State*, 397 So. 2d 910 (Fla. 1985) (Death by electrocution is not cruel or unusual punishment in violation of Article I, Section 17 of the Florida Constitution); *Marek v. State*, 492 So. 2d 1055 (Fla. 1986) (same); *Medina v. State*, 466 So. 2d 1046 (Fla. 1985) (same); *Buenoano v. State*, 565 So. 2d 309 (Fla. 1990) (Florida's electric chair is not cruel or unusual punishment despite a previous malfunction); *Squires v. State*, 565 So. 2d 318 (Fla. 1990) (same); *Hamblin v. State*, 565 So. 2d 320 (Fla. 1990) (same); *White v. State*, 565 So. 2d 322 (Fla. 1990) (same). At issue here is whether the manner in which Florida currently carries out execution by electrocution is constitutional.

"In order for a punishment to constitute cruel or unusual punishment, it must involve 'torture or a lingering death' or the infliction of 'unnecessary and wanton pain.' " *Jones v. State*, 701 So.2d 76, 79 (citing *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 2d 422 (1947)). "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Id.* (quoting *Resweber*, 91 L. Ed. 2d at 464, 67 S. Ct. at 376).

CLAIM I

WHETHER FLORIDA'S ELECTRIC CHAIR IN ITS PRESENT CONDITION CONSTITUTES CRUEL AND/OR UNUSUAL PUNISHMENT AND ITS USE FOR EXECUTION IS UNCONSTITUTIONAL BECAUSE IT DOES NOT RESULT IN INSTANT DEATH, CREATES A RISK OF PAIN, AND INFLICTS SEVERE MUTILATION ON THE BODY OF THE CONDEMNED PRISONER.

Claim Regarding Condition of Chair and Electrical Circuitry

Provenzano argues, based upon newly discovered documents, that the condition of chair itself, as well as the electric circuitry used to carry out a judicial electrocution was not in excellent condition as was represented in the *Jones* proceedings. Provenzano bases this claim on public records that indicate the wooden chair in which a condemned inmate sits when he or she is executed was replaced with a new wooden chair earlier this year, and on public records that indicate the electrical circuitry of the electric chair has had numerous failings, and that it was not replaced in 1993 or 1994, as was claimed in the *Jones* proceedings.

Although Provenzano alleges that inaccurate claims regarding the replacement of the electrical circuitry were made in the *Jones* proceedings, he has failed to attach the transcript of the *Jones* hearing to support his allegations.

At the hearing in this case, Provenzano did not focus much of his presentation on the replacement of the wooden chair. His argument on this issue, therefore, is primarily contained within his Amended Petition. Therein, he merely argues that based upon the fact that the old wooden chair was replaced with a new wooden

chair, the condition of the chair is different than it was in October 1997 when the Florida Supreme Court decided *Jones*. However, Provenzano does not assert that the new wooden chair is somehow structurally unsound.

Provenzano did focus a great deal of his presentation at the hearing in this matter on the maintenance of the electrical circuitry. Testimony presented at the hearing established that there have indeed been changes to the electrical circuitry of the electric chair. Specifically, Ira E. Whitlock, licensed electrical engineer, testified on behalf of Respondents as an expert in the field of electrical engineering and as an expert in the design and function of the electric chair. Whitlock testified that he has a contract with the Department of Corrections, and that pursuant to that contract, he developed a preventative maintenance program for the electrical circuitry of the electric chair in 1997. He stated that the equipment had not been maintained from its inception in the 1960s until he established the maintenance program, and that it was in a state of disrepair from neglect. This maintenance program involves several stages, including: a cleaning stage; an electrical test to insure the integrity of the equipment; a contact resistance test to measure the microhm resistance across the contacts; hypotensil to make sure the basic insulation level of the circuitry maintains its integrity that it will operate without failure during actual use; ground continuity tests; and ground potential tests. Whitlock testified that in total, he and the individuals working for him do forty or fifty different tests on the equipment. Whitlock testified that these testing procedures are the same procedures he uses in the industrial field. Additionally, Whitlock testified that he

calibrates the equipment and the chart recorder, and that the chart recorder is calibrated for both voltage and current.

Whitlock testified that all three breakers contained within the electrical circuitry of the electric chair were recently refurbished. He refurbished two of them and another company refurbished the third one. Whitlock did the following work on the two breakers: they were disassembled and examined to determine whether they were serviceable or usable; deficiencies were noted and necessary parts were replaced; the contacts were cleaned; electrical tests were performed on them; and, they was reassembled and returned to the Florida State Prison.

Whitlock testified that he had recommended replacement of the breakers, depending on the cost of the replacement. However, it was decided to refurbish rather than replace them. Whitlock testified that although the breakers are old, they are in excellent operating condition.

Whitlock also testified that the electrical circuitry includes a saturated core reactor which limits the current applied to a predetermined set phase.

Whitlock further stated that the Florida electric chair has a chart recorder, but that the chart recorder does not affect the functioning of the electric chair; it simply records events that have taken place.

Whitlock stated that he was present during the execution of Allen Lee Davis, and that the readings produced by the chart recorder indicated that the circuitry operated as it was designed and intended to operate. He

further stated that the accumulation of problems that had arisen from the years of neglect to the equipment have all been addressed.

Bob Hallman testified on behalf of Respondents as an expert in the field of engineering. Hallman testified that the maintenance program that Whitlock testified that he has developed is more comprehensive than most maintenance programs of industrial facilities in that the maintenance is carried out on a more regular and frequent basis, and because it is administered by a professional engineer. Hallman examined the chart recordings for the executions of Daniel Remeta, Leo Jones, Gerlad Stano, and Judy Buenoano. He calculated the level of ohms applied to each of the four inmates. Based upon his calculations, he opined that the equipment appeared to be functioning properly in that the currents that were applied to each individual inmate were regulated to the limits established by the equipment. He further opined that the chart recordings and the calculations derived therefrom indicate the equipment was functioning properly and as it was intended to function. Hallman further testified that the resistance exhibited by the inmates during their executions and the calculations derived therefrom indicate the equipment's testing and application results are all very repeatable. That signifies to Hallman that "we can very well count on or rely upon or predict the results we are going to get before we actually perform it, put the equipment into use."

Hallman also examined the chart recordings from the Davis execution, and determined that the results were consistent and appeared to be very repeatable and consistent with the previous numbers established with regard

to the four prior executions. Hallman testified that he sees no reason to question the overall reliability of Florida's electric chair.

John H. "Jack" McNeill testified that in 1993 or 1994, a "knife switch" or safety switch was installed, and that it is current technology. The knife switch is a spring-loaded switch that closes the receivers and completes the circuit so there is a circuit from the person in the chair to the load side of the executional breaker.

Additionally, McNeill testified that the breakers were thoroughly serviced in February and March of this year. Further, McNeill testified that the old chart recorder was replaced with a chart recorder that is of the latest technology, after the March 1998 executions. McNeill testified the chart recorder records the volts and amps administered during an execution, but that it does not have any effect whatsoever on the actual execution; it merely records data.

Jay Wiechert, a professional engineer licensed by the State of Arkansas, testified as an expert in the fields of electrical engineering and the design of judicial electrocution equipment. He testified that the electrical equipment used in Florida to conduct judicial electrocutions has a regulatory circuit built into it to prevent the current delivered to an inmate from going too high. Wiechert testified that the way the equipment limits the current is by reducing the voltage level. He testified that is precisely what occurred during the execution of Allen Lee Davis. Wiechert stated the variations in the chart recordings from the levels set forth in the execution protocol was a result of the regulatory part of the electrical system

insuring that the levels of voltage and current applied to Davis did not go too high. Wiechert testified the equipment operated the way it was designed to operate during the execution of Davis and during the test conducted on the equipment on July 7, 1999, that it did not malfunction, and that there is no indication that there will be a malfunction in the future.

Execution Day Protocol Claim

Provenzano argues that the Department of Corrections ("DOC") has not been following, and in fact cannot follow, the Execution Day Procedures ("execution protocol") established in April 1997, as a result of the problems that occurred during the execution of Pedro Medina. Provenzano contends that the execution protocol was written in such a way that it cannot be followed because it does not account for the variations in resistance created by the different characteristics, i.e., weight, muscle tone, fat content, skeletal configuration, size, body build, etc. of each individual inmate's body.

The relevant portions of the execution day protocol provide:

> The automatic cycle begins with the programmed 2,300 volts, 9.5 amps, for 8 seconds; 1,000 volts, 4 amps for 22 seconds; and 2,300 volts, 9.5 amps for 8 seconds. When the cycle is complete, the equipment is manually disconnected by _____. The safety switch is then opened by _____.

As stated above, Jay Wiechert testified for Respondents as an expert in the fields of electrical engineering

and the design of judicial electrocution equipment. With regard to the execution protocol, Wiechert testified that the numbers specified in the protocol are average numbers. He stated you cannot specify both volts and amps because the resistive load, or size, of each individual inmate, will determine the relationship between the volts and amps. Wiechert testified that the protocol is not well-written and that he recommended changing the language of the protocol as it presently exists. He would prefer to see a less technical description.

Ira Whitlock testified that he would agree that the language of the protocol should be amended because it is misleading and "probably misrepresents the intended function of the equipment based on its design." Whitlock would change the language so that it is more general.

As Provenzano argues, it is apparent that the execution protocol cannot be exactly followed because it fails to take into consideration the variations in resistance of the inmate's bodies. Resistance (ohms) is measured by dividing the volts by the amps, e.g. 2300 volts divided by 9.5 amps equals 242.1 ohms. Thus, the resistance load dictates the relationship between the volts and the amps.

The system is designed to achieve current (amps), not voltage. The last five executions provided the following:

Inmate	Cycle	Volts	Amps	Ohms
Buenoano	1	2000	9.4	212.8
	2	650	2.9	224.1
	3	1,900	9.4	202.1
Remeta	1	2,100	9.2	228.3
	2	675	2.9	232.8
	3	1,850	8.9	207.9
Stano	1	1,600	9.1	175.8
	2	550	2.9	189.7
	3	1,500	9.0	166.7
Jones	1	1,600	9.1	175.8
	2	500	2.9	172.4
	3	1,450	9.2	157.6
Davis	1	1,500	10	150
	2	600	4.5	133
	3	1,500	10	150

As stated above, Bob Hallman testified that these results were consistent and appeared to be very repeatable, and that he sees no reason to question the overall reliability of Florida's electric chair.

There is nothing magic in the Florida execution protocol: Walter Zant, retired Warden of Warden for the Georgia Diagnostics Center, which is where the sentence of death by electrocution is carried out in Georgia, testified that he witnessed eighteen executions in Georgia,

and observed the voltage and amperage meters. He stated that the highest amps used in these executions was four (4) amps and the lowest was one and one-half (1/2) amps. The Georgia program calls for the following levels of voltage and amperage: two thousand (2,000) volts for four seconds, one thousand (1,000) volts for two seconds, and then two hundred and eight (208) volts for one minute and fifty-four seconds.

Testing Protocol Claim

Provenzano argues that the testing of the electric chair is not being conducted in accordance with the Testing Procedures for Electric Chair ("testing protocol") established in April 1997, as a result of the problems that occurred during the execution of Pedro Medina. He claims that the precise voltage and amperage requirements established in the testing protocol are not being used during the actual tests conducted on the electric chair.

The relevant provisions of the testing protocol provide:

> C. The Test:
>
> After the equipment is examined, remove the natural sea sponges from the saturated saline solution and position in the head piece and leg piece to cover the electrodes. Connect the head piece and leg piece to a repeatable resistive load to measure voltage and amperage. Energize power to the execution control panel. Close safety switch. Energize the execution switch.

> Begin automatic cycle with the programmed 2,300 volts, 9.5 amps, for 8 seconds; 1,000 volts, 4 amps for 22 seconds; and 2,300 volts, 9.5 amps for 8 seconds. After cycling is completed, manually disconnect the equipment at both the execution panel and the safety switch. Shut down all other related operational equipment.

Jay Wiechert testified that he has conducted tests on the electrical equipment used for Florida's electric chair. He stated that he uses a bank of resistors with known ohmic value. Wiechert testified that conducting tests using a bank of resistors, or electrical devices that change electrical energy into heat, with a known resistive load provides repeatable results.

The testing of the electrical system on July 7, 1999, (the day before Davis' execution) was necessarily performed without a human resistance load. However, the system performed within the parameters of the protocol current. It worked as it was designed and intended to work.

Claim Regarding Resistance Created By Inmate's Body

Provenzano argues that the resistance created by an inmate's body is different than the representations that were made during the *Jones* proceedings. This Court was not provided with a copy of the transcript of the *Jones* hearing.

However, as stated above, Jay Wiechert testified for Respondents as an expert in the fields of electrical engineering and the design of judicial electrocution equipment. Wiechert testified that the resistance created by

each individual inmate will vary because of the varying physical characteristics of each inmate.

Claim Regarding Pain Associated with Death By Judicial Electrocution

Provenzano claims that death by electrocution in Florida's electric chair is not instantaneous or painless, and that he will suffer conscious pain because his brain will not immediately cease functioning once the electrical current is applied to him. Additionally, he claims he will suffer disfigurement and mutilation.

In support of his claim, Provenzano presented the testimony of individuals who witnessed the executions of Jesse Tafero, Jerry White, Pedro Medina, Judy Buenoano, Leo Jones, and Allen Lee Davis. These witnesses testified that they heard noises from the individuals being executed, that they observed the bodies of the individuals being executed tighten upon the application of electrical current, and that they observed body movements in the individuals after the electrical current had been applied and turned off. Specifically, these witnesses testified as follows.

Ellen McGarrahan testified that she witnessed the execution of Jesse Tafero as a reporter for the Miami Herald. She stated that when the electrical current was applied to Tafero, his body tensed, and flames and smoke rose from both sides of the head piece. McGarrahan testified the electrical current was then turned off. At that time, she observed Tafero's chest move, and his head nod back and forth. According to McGarrahan, the electrical current was then applied for a second time. McGarrahan

stated that once again, flames and smoke rose from both sides of Tafero's head. She stated that the electrical current was once again turned off. McGarrahan testified that she then saw Tafero's chest and head moving again. McGarrahan testified that the electrical current was then applied to Tafero for a third time. Once again, flames and smoke arose from both sides of Tafero's head. She stated the electrical current was again turned off. McGarrahan testified that after the third application of electrical current, there was no movement from Tafero's body.

Michael Minerva testified that in 1995 while he was the Capital Collateral Regional Counsel for the State of Florida, he witnessed the execution of Jerry White. He stated that once the electrical current was applied to White, White's body stiffened and was thrust upward and backward to the back of the electric chair. Minerva testified that he heard noise that sounded like "air moving through the lips, the throat, that kind of a sound" from White's body. Minerva could not tell whether the air "was coming in or going out."

Glen Dickson testified that he was Pedro Medina's pastor, and that in that capacity, he witnessed Medina's execution. Dickson testified that once electrical current was applied to Medina, smoke and flames rose from Medina's head, and that there was an acrid odor about the witness room. Dickson testified that after the cessation of electrical current and after the strap which had been fastened across Medina's chest had been loosened, Medina's chest moved and he appeared to take three deep, gasping breaths. Dickson stated that there was a period of time in between each breath. Dickson also

stated that after Medina took the third gasping breath, Medina's body slumped.

Gregory C. Smith, Capital Collateral Regional Counsel for the Northern Region, testified that he witnessed the execution of Judy Buenoano. Smith testified that when Buenoano was being secured in the electric chair, it appeared that the strap across her chest was initially secured too tightly. Smith stated that Buenoano grimaced and looked "sharply" at the correctional officer who was tightening the chest strap. Smith testified that after Buenoano indicated she was in pain from the tight strap, the strap was slightly loosened. Smith testified that once the electrical current was applied to Buenoano, her body tensed, and white smoke or steam arose from the electrode that had been placed on her leg. Smith stated that after the electrical current was turned off. Buenoano's body slumped.

Rabbani Muhammad testified that he observed the execution of Leo Jones in his capacity as Jones' spiritual advisor. Muhammad stated that when the straps were placed under his chin, he could see Jones' "flesh bulge from the tightness of the strap." Muhammad testified that once the electrical current was applied to Jones, Jones' body tensed and moved up and back against the chair. Muhammad testified that after the electrical current was turned off, he observed Jones' body move three times in a heaving or spasm-type manner.

Additionally, Muhammad testified that following the execution and after Jones' body had been transported to Tallahassee by a Gainesville funeral home whom he hired to transport Jones' body, he prepared Jones' body for

burial. He stated that while he was preparing the body, he observed wounds on Jones' body which included wounds on the top right and left sides of Jones' head, a burn on Jones' right leg, and a "puncture" in Jones' chest which measured one-eighth of an inch in diameter. Muhammad photographed these wounds, and those photographs were entered into evidence.

John W. Moser, Capital Collateral Regional Counsel for the Middle Region, testified that in his capacity as Capital Collateral Regional Counsel, he witnessed the execution of Allen Lee Davis. Moser testified that between the time Davis was secured in the electric chair and the time the electrical current was applied to Davis, he heard what sounded like two screams from Davis.

Moser testified that when the electricity was applied, Davis' body tensed and arched backward. Moser stated that blood appeared on Davis' chest within seconds of the tensing of his body. Moser did not know exactly when the current was applied to Davis' body, but that approximately three minutes after the time when Davis' body tensed, he observed Davis' chest move in and out several times. Moser stated that at the time he observed Davis' chest move, Davis' body was no longer tensed.

Mark Lazarus, Victim Assistance Administrator for the Florida Department of Corrections, testified that he observed the execution of Allen Lee Davis. Lazarus testified that after the head piece was placed on Davis' head, he heard two one-syllable sounds coming from Davis and that the sounds sounded like Davis was trying to "make some noise" or "yell out." Lazarus also testified that when the electricity was administered to Davis' body,

Davis's body clenched. Additionally, Lazarus testified that while Davis' body was tensed up, blood began to drip from behind the mask. Lazarus further testified that after the electricity was turned off, there was a shuddering in Davis' chest area, like a muscle spasm.

Sheila McAllister, Correctional Probation Officer at Wakulla Correctional Institution, testified that she witnessed the execution of Allen Lee Davis. McAllister testified that when Davis was brought into the execution chamber, his face appeared to be red, but not as red as it appeared to be in the photographs taken of Davis after the execution had been carried out. She stated that when the electrical current was applied to Davis' body, he stiffened and his hands clenched. McAllister also stated that before the electrical current was applied to Davis, he made a couple of moaning sounds. McAllister also testified that while the current was on, she observed blood on Davis' chest, and she observed something dripping from behind Davis' mask. McAllister further testified that after the electrical current had been turned off, and while the first medical person was examining Davis, she observed Davis' chest move three or four times, like muscle spasms; the movements were spaced out with a few seconds in between each of them.

The testimony given by Patricia McCusker, Assistant Superintendent of the Work Camp at Florida State Prison, at the hearing held in Jacksonville in the Leo Jones case was admitted into evidence and read into the record. McCusker testified that she witnessed the execution of Pedro Medina. McCusker testified that when the electrical current was applied to Medina, she observed Medina's left hand tighten, and she observed smoke and

flames coming from Medina's head. She testified that the witness room smelled as if something were burning. McCusker also testified that after the electrical current had been turned off, and while the medical personnel were examining Medina, she observed two or three movements in Medina's chest which were like contractions of the chest muscle.

William R. Dotson, Inspector Supervisor for the Gainesville Field Office with the Department of Corrections' Inspector General's Office, witnessed the execution of Allen Lee Davis as a witness for the Inspector General. Dotson took some of the post-execution photographs of Davis still seated in the electric chair that were admitted into evidence at the hearing. The remainder of the photographs taken of Davis while he was still in the electric chair were taken at Dotson's direction by "Mr. Geibig." Dotson felt photographs of Davis' body were necessary in order to document the event.

Michael R. Collins, employed with Florida State Prison as a nurse, testified that he attended the execution of Allen Lee Davis. Collins testified that after the mouth strap and head piece were put in place and before the electrical current was applied, Davis made one "loud maybe two, three-second high-pitched murmur." Collins also testified that when the electrical current was applied to Davis, Davis' body became rigid and his fingernails turned bright red. Collins further testified that after the electrical current was stopped and after Mr. Matthews, the Florida State Prison physician's assistant, was examining Davis, he observed blood on Davis' shirt in his chest area and on his upper right side, by his collar. Collins stated that the blood was dripping from under the

mask, and that it ceased dripping before Mr. Matthews finished examining Davis.

Steve Wellhausen, employee of Florida State Prison assigned to escort the official witnesses to the execution of Allen Lee Davis, testified that he witnessed Davis' execution. Wellhausen testified that about a minute after the mouth strap was placed across Davis' mouth and after the head piece was placed on Davis' head, he heard Davis make a very low muffled sounding moan. Wellhausen testified that when the electricity was applied to Davis, he observed Davis's hands tighten and his body moved backwards. At some point after the execution began, Wellhausen observed blood coming from beneath the mask. Wellhausen also testified that after the electrical current was discontinued, he observed Davis' body slump, and he observed more than one chest movement which looked like "muscles contracting in the chest." Wellhausen stated these chest movements did not appear to be chest movements associated with breathing. Wellhausen further testified that he had observed similar chest movements in the more than ten prior executions that he has witnessed.

Victor Seryutin, M.D., one of the attending physicians at Florida State Prison, testified that he observed the execution of Allen Lee Davis as the physician assigned to certify when Davis was dead. Seryutin testified that after the electrocution, he observed Davis' chest move a little bit.

Robert K. Thomas, Assistant Maintenance Superintendent at Florida State Prison testified that he is a member of the team who actually fastened the straps that

secured Davis to the electric chair. Thomas testified that he held the mouth strap in place while Mr. Hackle was tightening it. Thomas testified that when Hackle was tightening the mouth strap across Davis' mouth, he heard Davis moan one time. Thomas testified that he did not do anything when he heard Davis moan. Thomas also testified that after he, Mr. Hackle, and Mr. McNeill had secured Davis in the electric chair, during the time that the Warden was on the telephone with the Governor's office, and approximately ten seconds before the current was applied to Davis, he observed two bubbles of blood coming out of Davis' left nostril. Thomas testified that he was able to observe the bubbles of blood because he was standing to the left of Davis and he could see behind Davis' face mask. Thomas stated that he did not notify anyone or do anything else when he observed the blood, and initially did not give a reason as to why he did not notify anyone. However, on cross-examination, Thomas acknowledged that he did not notify anyone or do anything because he knew the executioner was getting ready to pull the switch. Thomas also testified that after the current was turned off and while Mr. Matthews was examining Davis, he observed Davis' body heave one time.

John H. "Jack" McNeill, Utility Supervisor for Florida State Prison, testified that he is part of the team that helped secure Allen Lee Davis into the electric chair. He testified that he heard Davis grunt when he put the waist strap on Davis, and heard Davis grunt again when Mr. Thomas tightened the chin strap for the head piece.

William Muse, Lieutenant with the Florida Department of Corrections, assigned to Florida State Prison,

testified that he witnessed the execution of Allen Lee Davis. He testified that he heard Davis moan after the mouth piece was put in place and while he was being strapped into the electric chair. Muse testified that after the cycle of current had been terminated, he observed blood on Davis' shirt, blood on the strap, and blood coming from Davis' nostril. Muse also testified that while Mr. Matthews was examining Davis, he observed Davis' chest move up and down two times, like Davis was exhaling.

Thomas Varnes, Warden at Wakulla Correctional Institution testified that he witnessed the execution of Allen Lee Davis. Varnes testified that after the mouth strap and chin strap of the head piece were tightened and the face mask was lowered, he heard Davis moan like he was trying to say something. Varnes stated the moans occurred before the electrical current was applied to Davis. Varnes also testified that after the electrical current had been turned off, he observed blood by the "top strap," and that the blood began to appear on Davis' shirt. Varnes stated that he thought the nose bleed may have something to do with the high blood pressure that Davis was reported to have. Varnes testified that he has high blood pressure and that it is not unusual for him to have a nose bleed. He testified that when he has such a nose bleed, he does not suffer from any pain.

Aubrey D. Thornton, Assistant Warden at Florida State Prison, testified that he was one of the individuals responsible for strapping Allen Lee Davis into the electric chair. Thornton testified that he was one of three people responsible for securing the mouth strap on Davis. Thornton testified that he stood in front of Davis and

positioned the mouth strap on Davis, and that the Maintenance Superintendent buckled the mouth strap to the back of the chair. Thornton stated that he was one of the individuals involved in the drafting of the execution protocol, and that the mouth strap was placed on Davis in accordance with the execution protocol. Thornton testified that the mouth strap, as it appears in Petitioner's Exhibit 1-A was not in the same position that it was in when Thornton positioned it on his [sic] prior to the execution. Thornton testified that the mouth strap was higher and closer to Davis' nose. Thornton also testified that Davis' face began to turn red after the mouth strap was applied to him, but that Davis did not appear to have any difficulty breathing. Thornton also testified that he heard Davis moan. Furthermore, Thornton testified that if any of the Department of Corrections personnel in the execution chamber notice anything unusual while they are securing an inmate to the electric chair for execution, they are authorized to bring it to his attention or to the attention of Warden Crosby. However, he would not expect the person to bring it to his attention prior to the application of electrical current.

James Crosby, Warden of Florida State Prison testified that after the mouth piece was placed on Davis, and just before the execution, he heard two muffled sounds from Davis, which sounded like Davis was trying to say something.

William F. Mathews, P.A., physician's assistant for Florida State Prison, was assigned the duty to determine whether Allen Lee Davis was dead after the conclusion of the application of electrical current to him during his judicial electrocution. Matthews testified that he had a

clear view of Davis when the mouth strap was applied to him and that the mouth strap was not impinging on his nose in any way, and that Davis did not appear to have any difficulty breathing. Matthews testified that after the electrical current was turned off, he approached Davis and for approximately two minutes, tried to see if Davis had a palpable radial pulse. Matthews testified that he did not detect a pulse. Matthews testified that he then loosened the chest strap and listened to Davis' chest for any heart sounds. Matthews stated that when he loosened the chest strap, Davis' body relaxed and slumped forward, and that he did not detect any heart sounds. Matthews also testified that he listened to Davis' chest for lung sounds, but that he did not detect any. Matthews further testified that while he was examining Davis, he observed Davis' chest or upper torso move two times with about a minute or minute and a half between each movement. Matthews described this movement as muscular movement in the chest and shoulder areas. During that period of time, Davis did not exhibit any signs of life. Matthews also testified that after the head piece was secured to Davis' head and before the electric current was applied, he heard Davis make noises like Davis was trying to say a few words.

Donald Price, Ph.D., neurophysiologist and psychologist at the University of Florida, who carries out research on pain mechanisms and on pain behavior and pain perception, testified as an expert for Provenzano in neurophysiology. Price has conducted research involving primarily low voltage electricity, and he has not done any studies with regard to the levels of voltage and currents applied in judicial electrocutions. Price is of the opinion

that "judicial electrocution results in considerable enormous pain and suffering as well as other negative emotional experiences." Price testified that pain could be elicited through the tightening of the straps; through the penetration of the brain with electrical currents, and through peripheral stimulation of body tissues. Price also testified that he is of the opinion that "it is highly, highly unlikely that the initial current surge would instantly and permanently depolarize or incapacitate the human brain." Price testified that the kinds of behavior indicative of pain include moaning, screaming, gasping for air, moving the head from side to side, writhing movements in the chair. Price further testified that people's facial expressions can be indicative of pain. Price testified that the facial expressions captured in the photographs of Davis after his execution while he was still seated in the electric chair, which were admitted into evidence as Petitioner's Exhibit 1, are indicative of pain.

J. Patrick Reilly, M.S., testified for Provenzano as an expert in the effects of electricity on biological systems. He testified that it is his opinion that the temperature rise during the entire thirty-eight second cycle of a judicial electrocution is insufficient to thermally damage the tissues of the brain, and that the current is too strong to result in a high probability of fibrillating the heart after completion of the execution.

John Wickswo, Ph.D., testified for Provenzano as an expert in the areas of physics, electromagnetics, biological physics, biomedical engineering, and nondestructive testing. Dr. Wickswo opined that the Florida electric chair does not cause instantaneous and painless death and that

there is no scientific threshold current or voltage level that would effectuate instantaneous and painless death.

Robert Kirschner, M.D., forensic pathologist from Illinois, testified as an expert in the area of forensic pathology. Kirschner testified that he performed an autopsy on the body of Allen Lee Davis. He testified that during Davis' autopsy, he was unable to identify the precise source of the nose bleed that Davis suffered, but that it was coming from the septal area of the left nostril. Kirschner testified that the placement of the mouth strap across Davis' mouth inhibited Davis' breathing and caused him to become at least partially asphyxiated before the application of electrical current to him. Kirschner testified that he is of the opinion that Davis' death was caused by electrocution and association of partial asphyxiation which occurred before the electrocution. Kirschner further testified that he is of the opinion that Davis was suffering from conscious pain during the period of asphyxiation.

Kris Sperry, M.D., Chief Medical Examiner for the Georgia Bureau of Investigation, testified for Respondents in the area of forensic pathology. Sperry was present as a witness during Kirschner's autopsy of Allen Lee Davis. Sperry opined that he [sic] application of ten amps of current to brain tissue causes instant depolarization and instant loss of consciousness. Sperry testified that an unconsciousness person cannot feel pain, and that death from irreversible brain damage occurs within seconds of the application of the current because the brain is heated well above a temperature from which it can recover. Sperry testified that seventy-five milliamps (75/1000 of an amp), externally applied to the body causes fibrillation

of the heart. Sperry also testified that one amp of current applied externally to the body is sufficient to cause asystole, or complete stoppage of the heart. Sperry opined that after the heart is stopped, spontaneous heart movement may begin again, but the heart is irreversibly damaged and cannot recover. However, after the heart has stopped, agonal sounds and movement may still occur, as they are part of the last vestiges of life. Sperry also testified that an individual does not need to still be alive in order to bleed. Sperry testified that blood can drain from an individual for hours after the individual is dead.

Sperry further opined that the nose bleed suffered by Davis did not result from the placement of the strap across Davis' mouth, but that it occurred from some sort of increased pressure in Davis' upper torso or head region.

The deposition of William Hamilton, M.D., Medical Examiner for the Eighth Judicial Circuit, was read into the record due to Hamilton's unavailability. Hamilton was accepted as an expert testifying an behalf of Respondents in the field of pathology. Hamilton testified that he performed an autopsy on Allen Lee Davis. Hamilton testified that Davis had burns on his scalp and forehead, on his superpubic and right upper medial thigh region, and behind the right knee. Hamilton testified that he has performed autopsies on approximately thirty death row inmates who have been executed in Florida's electric chair. He stated that the burns on the heads and legs of the inmates executed within the last five or six years have been smaller than those that were observed on inmates

who were executed years ago. Hamilton testified that these burns are post-mortem burns.

Hamilton testified that upon his examination of Davis, he observed that there was blood in Davis' naval [sic] cavity, but that he did not dissect the paranasal sinuses to find the cause. Hamilton testified that it appeared to be an ordinary nosebleed, and that if the electrical current had not been applied to Davis at that time, he would not have had the nose bleed.

Hamilton further testified that in his opinion, the delivery of ten amps to the human body with the path of the current being from the head to the leg results in immediate death, immediate loss of consciousness, immediate massive depolarization of the nervous system, and a rapid rise in the temperature of the internal tissues in the path of the current. He opined that the path of current would be from the top of the head through the brain and brain stem, through the center of the body, and then exiting through the electrode on the leg. Dr. Hamilton opined that immediate death would also result if the current were only four amps.

B.J. Wilder, M.D., Professor Emeritus at the University of Florida in neurology and neuroscience, testified on behalf of Respondents in the areas of neurology and neurophysiology. Wilder testified that during electroconvulsive therapy, in which the brain is stimulated with electricity to produce a controlled convulsion, two hundred and fifty to three hundred milliamps, or 250/1000 to 300/1000 of one amp, is used. Wilder testified that electrical currents of this level cause the patient to lose consciousness, and that upon regaining consciousness, the

patient does not report pain. Wilder opined that the introduction of ten amps of electrical current by the means of a head-to-leg electrode, with one thousand five hundred volts would cause the individual to lose consciousness within a matter of milliseconds. Further, Wilder opined that the administration of one thousand five hundred (1,500) volts at ten (10) amps for eight seconds, followed by seven hundred (700) volts at four and one half ($4^1/_2$) amps for twenty-two seconds, followed by one thousand five hundred (1,500) volts at ten (10) amps for four seconds would cause a massive depolarization of every cell in the cerebral cortex, and would in probability cause a depolarization of cells in deep brain structures, such as the brain stem and the thalamus. Wilder further opined that the damage caused by such a massive current would be of such a magnitude that the brain cells would not recover. Wilder stated that an inmate would not perceive pain, fear, or anger once such a current is turned on. Wilder further testified that the brain dies before the body does, and spontaneous movements seen after electrocution in the electric chair are agonal.

Tim Bullard, M.D., who is Board Certified in emergency medicine and internal medicine, testified on behalf of Respondents as an expert in the field of emergency medicine. Dr. Bullard testified that he has treated patients with electrical injuries. He testified that fifty (50) to one hundred (100) milliamps of electrical current would cause the heart to fibrillate. Bullard further testified that any movements made by an individual after he received ten (10) amps of current and one thousand five hundred (1,500) volts administered by means of a head-to-leg current path for eight seconds, followed by 4 amps and six

hundred fifty (650) volts) for twenty-two seconds, followed by ten (10) amps and one thousand five hundred (1,500) volts for four seconds, would be agonal movements.

Walter Zant, former Warden for the Georgia Diagnostics Center, which is where the sentence of death by electrocution is carried out in Georgia, testified on behalf of Respondents. Zant testified that the execution by electrocution process in Georgia involves the following levels of voltage and amperage: two thousand (2,000) volts for four seconds, one thousand (1,000) volts for two seconds, and then two hundred and eight (208) volts for one minute and fifty-four seconds. He stated that during the eighteen executions that he was involved in, he never observed the amperage level during a judicial electrocution go higher than four amps. Zant testified that in Georgia, the inmate is placed in the electric chair and secured in the chair by a strap across his chest, a strap around his waist, a strap on each thigh, a strap on each ankle, a strap on each upper arm, and a strap on each wrist. Zant testified that the inmate's head is secured by a chin strap which is placed around the chin and strapped to a head post on the chair itself. The purpose of the chin strap is to prevent movement of the head and to prevent movement in the electric chair. Zant stated it is "necessary in order to carry out the execution in a humane manner." Zant testified the chin strap is leather and that it looks like the chin strap on a football helmet. Zant further testified there is a strap that goes under the inmate's chin to keep the electrodes in the headgear on the inmate's head during the execution process. Zant stated the straps are affixed "very tight." Zant further

testified that although both straps force the inmate's mouth closed, they do not touch the inmate's lips or inhibit the inmate from opening his lips and breathing through his mouth.

Claim Regarding Alleged Indifference Toward Inmates Who Have Been Executed

Provenzano argues that the Florida Department of Corrections ("DOC") has exhibited indifference toward the inmates whom have been executed in the electric chair. In support of his argument, Provenzano presented the testimony of Gregory Smith. As set forth above, Smith testified that when Buenoano was secured into the electric chair, the strap across her chest was too tight. It is important to note, however, that Smith also testified that when Buenoano grimaced and looked at the officer securing the strap, the strap was loosened slightly.

Provenzano also presented the testimony of Mark Lazarus to support this argument. Lazarus testified that although water dripped onto the front and back of Davis' shirt, the water was not wiped off of him. This was despite Lazarus' statement that the water that dripped onto the floor had been mopped up.

Dr. Victor Seryutin's statement that he is not under any obligation to provide any treatment to an inmate who is about to be executed also supports Provenzano's claim. Seryutin testified that his sole purpose there is to certify when the inmate is dead.

Further, the testimony of Robert Thomas that he tightens the straps as tight as he can, and that he did nothing when he heard Davis moan may provide some

support for Provenzano's claim. However, Thomas' testimony was countered by Jack McNeill's testimony that his main concern it [sic] to tighten the straps so the inmate will not hurt himself or hurt anybody standing around him.

The testimony of Warden James Crosby was especially important on this issue. Crosby has taken great effort to ensure that execution in Florida is carried out in a constitutional manner. He has spent a great amount of time studying and gaining an understanding of the process and the protocols developed to implement it. He testified that he had not been informed that Thomas had seen bubbles of blood before the current had been applied to Davis, he stated that he would have expected Thomas or any of the other officers involved in the execution process to immediately report any problem to him. Crosby further stated that he was going to fix that problem.

Additionally, Crosby stated that he would expect the straps to be tightened so they are snug, but that he would not expect the straps to be tightened as tight as they could be pulled.

With regard to the water, Crosby testified that although he would not want water to be dripping [sic] an inmate's face, it is important for the head sponge to be sufficiently wet.

Execution in the electric chair invokes emotional responses such as fear and dread. It involves some necessary pain and discomfort when the straps are applied and tightened. However, strapping is necessary to minimize

movement and insure the firm placement of the electrodes. While the mouth strap is used to secure the head to the chair, its design leaves something to be desired.

CLAIM II

WHETHER FLORIDA'S CURRENT USE OF JUDICIAL ELECTROCUTION AS ITS SOLE METHOD OF EXECUTION IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY.

Provenzano asserts that Florida is one of only four states that still employs electrocution as the manner by which the sentence of death is carried out. This issue is beyond the scope of the issue which this Court was ordered to decide. However, having said that, this Court concludes that said issue has already been decided adversely to Provenzano. *See Jones v. State*, 701 So. 2d at 79 (citing *Campbell v. Wood*, 18 F. 3d 662, 682 (9th Cir. 1994) ("We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice."); *Hunt v. Nuth*, 57 F. 3d 1327, 1338 (4th Cir. 1995) ("[T]he existence and adoption of more humane methods [of execution] does not automatically render a contested method cruel and unusual.")

FINDINGS OF FACT

Based upon the foregoing, and by the greater weight of the evidence, the Court hereby makes the following findings of fact.

1) During the execution of Allen Lee Davis, the electric chair functioned as it was intended to function. Although the breakers and other components of the electrical circuitry are old, the electric circuitry is adequate to assure the proper functioning of the electric chair.

2) The cycles of voltage and amperage applied in the execution of Allen Lee Davis did not deviate from the execution protocol which was previously approved by the Florida Supreme Court. The execution protocol merely states: "The automatic cycle **begins** with the programmed 2,300 volts, 9.5 amps, for 8 seconds . . . . " (emphasis added). The protocol does not state the voltage and amperage levels set forth therein are the precise voltage and amperage levels that must be administered to the inmate who is being executed.

The execution protocol does not take into account the varying levels of resistance created by each and every inmate. The resistance created by each executed inmate's body, or ohms, can be determined by dividing the number of volts administered by the number of amps administered. Since the level of resistance varies from inmate to inmate, these figures must necessarily vary. The variations in these figures do not violate the execution protocol.

3) The death of Allen Lee Davis did not result from asphyxiation caused by the mouth strap.

4) Allen Lee Davis did not suffer any conscious pain while being electrocuted in Florida's electric chair. Rather, he suffered instantaneous and painless death once the current was applied to him.

5) The nose bleed incurred by Allen Lee Davis began **before** the electrical current was applied to him, and was not caused whatsoever by the application of electrical current to Davis. This Court is unable to make a finding regarding the exact cause or situs of initial onset of the nose bleed because that information was not determined during either of the autopsies performed on Davis' body.

6) The post-execution photographs of Allen Lee Davis indicate that the straps used to restrain Davis' body, specifically, the mouth strap and chin strap, may have caused Davis to suffer some discomfort. However, the straps did not cause him to suffer unnecessary and wanton pain, and the mouth strap was not a part of the electrical operation of the electric chair.

7) The use of a mouth strap ~~to~~ secure an inmate's head to the electric chair may be desirable, however a smaller and/or redesigned mouth strap could accomplish the same purpose without raising the same issue involved here.

8) Execution inherently involves fear, and it may involve some degree of pain. That pain may include pain associated with affixing straps around the head and body to secure the head and body [sic] the electric chair. However, any pain associated therewith is necessary to ensure that the integrity of the execution process is maintained.

CONCLUSION

Execution by electrocution in Florida's electric chair as it exists in its present condition as applied does not

constitute cruel or unusual punishment, and therefore, is not unconstitutional.

DONE and **ORDERED** on this 2nd day of August, 1999.

/s/ Clarence T. Johnson, Jr.
CLARENCE T. JOHNSON, JR.
Senior Judge
FSC Order 2000R-269

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of August, 1999, a true and correct copy of the foregoing was furnished by U.S. mail and facsimile transmission to:

1) **Katherine V. Blanco, Assistant Attorney General, Carol M. Dittmar, Assistant Attorney General, Kenneth Nunnelly, Assistant Attorney General, and Carolyn Snurkowski, Assistant Attorney General**, Westwood Center, Suite 700, 2002 North Lois Avenue, Tampa, Florida 33607-2366, fax (813) 871-7834;

2) **John Moser, Capital Collateral Regional Counsel – Middle, Harry P. Brody, Assistant CCRC**, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, fax (813) 740-3554;

3) **Jay Taylor, Assistant State Attorney**, Fourth Circuit of Florida, 330 East Bay Street, 600 Duval County Courthouse, Jacksonville, Florida 32202; fax (904) 630-1848; and

4) **Susan Maher, Deputy General Counsel, Department of Corrections**, 2601 Blair Stone Road, Tallahassee, Florida 32399-2500, fax (850) 922-4355;

5) **Tanya Carroll, Deputy Clerk Capital Cases,** Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925, fax (850) 488-2100.

/s/ Erin J. O'Leary
Senior Trial Court
Staff Attorney

Supreme Court of Florida

THOMAS H. PROVENZANO,
Petitioner,

vs.

MICHAEL W. MOORE,
Respondent.

No. 95,973

[September 24, 1999]

PER CURIAM.

Thomas H. Provenzano, at a time when he was under warrant of death, filed a petition for writ of habeas corpus, a petition to invoke this Court's "all writs" jurisdiction, and a petition for extraordinary relief. In order to give this matter full consideration, this Court entered a stay of execution on July 8, 1999. This Court directed the circuit court to hold an evidentiary hearing regarding the functioning of the electric chair. Following that four-day hearing, the circuit court rendered findings of fact with respect to the functioning of the electric chair and concluded that the electric chair does not constitute cruel or unusual punishment. These findings of fact are the subject of this appeal. We have jurisdiction pursuant to article V, sections 3(b)(1) and (9) of the Florida Constitution. For the reasons explained below, we affirm the circuit court's order.

During the evidentiary hearing on this matter, both parties presented several witnesses, including testimony from experts. Most of the testimony focused on alleged errors committed by the Department of Corrections

(DOC) during recent executions, particularly the execution of Allen Lee Davis on July 8, 1999. At the conclusion of the hearing, the circuit court entered an order denying relief, wherein it made the following findings of fact:

> (1) During the execution of Allen Lee Davis, the electric chair functioned as it was intended to function. Although the breakers and other components of the electrical circuitry are old, the electric circuitry is adequate to assure the proper functioning of the electric chair.
>
> (2) The cycles of voltage and amperage applied in the execution of Allen Lee Davis did not deviate from the execution protocol which was previously approved by the Florida Supreme Court. The execution protocol merely states: "The automatic cycle *begins* with the programmed 2,300 volts, 9.5 amps, for 8 seconds. . . . " (emphasis added). The protocol does not state the voltage and amperage levels set forth therein are the precise voltage and amperage levels that must be administered to the inmate who is being executed.
>
> The execution protocol does not take into account the varying levels of resistance created by each and every inmate. The resistance created by each executed inmate's body, or ohms, can be determined by dividing the number of volts administered by the number of amps administered. Since the level of resistance varies from inmate to inmate, these figures must necessarily vary. The variations in these figures do not violate the execution protocol.
>
> (3) The death of Allen Lee Davis did not result from asphyxiation caused by the mouth strap.

(4) Allen Lee Davis did not suffer any conscious pain while being electrocuted in Florida's electric chair. Rather, he suffered instantaneous and painless death once the current was applied to him.

(5) The nose bleed incurred by Allen Lee Davis began *before* the electrical current was applied to him, and was not caused whatsoever by the application of electrical current to Davis. This Court is unable to make a finding regarding the exact cause or situs of the initial onset of the nose bleed because that information was not determined during either of the autopsies performed on Davis' body.

(6) The post-execution photographs of Allen Lee Davis indicate that the straps used to restrain Davis' body, specifically, the mouth strap and chin strap, may have caused Davis to suffer some discomfort. However, the straps did not cause him to suffer unnecessary and wanton pain, and the mouth strap was not a part of the electrical operation of the electric chair.

(7) The use of a mouth strap to secure an inmate's head to the electric chair may be desirable, however a smaller and/or redesigned mouth strap could accomplish the same purpose without raising the same issue involved here.

(8) Execution inherently involves fear, and it may involve some degree of pain. That pain may include pain associated with affixing straps around the head and body to secure the head and body [to] the electric chair. However, any pain associated therewith is necessary to ensure that the integrity of the execution process is maintained.

The circuit court also made the following conclusion of law:

> Execution by electrocution in Florida's electric chair as it exists in its present condition as applied does not constitute cruel or unusual punishment, and therefore, is not unconstitutional.

Provenzano raises four arguments regarding the circuit court's order. First, Provenzano asserts that the circuit court erred in concluding that the electric chair did not constitute cruel or unusual punishment. Provenzano alleges three different bases for this conclusion: (1) the electric chair causes pain, both in preparing for and during the electrocution, (2) the electrical circuitry has not been maintained, and (3) DOC has failed to follow protocol.

This Court recently concluded in *Jones v. State*, 701 So. 2d 76, 79 (Fla. 1997), that "[i]n order for a punishment to constitute cruel or unusual punishment, it must involve 'torture or a lingering death' or the infliction of 'unnecessary and wanton pain.' " (citing *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947)). The record in this case reveals abundant evidence that execution by electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain. The record also contains evidence that the electric chair is and has been functioning properly and that the electrical circuitry is being maintained.

In *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997) (quoting *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)), this

Court stated, "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' " We find that the circuit court's findings of fact are supported by competent, substantial evidence. Therefore, we again conclude, as we did in Jones, that Florida's electric chair is not cruel or unusual punishment.

We are aware that the record contains numerous references from witnesses, including State witnesses, that the execution protocol is not well written. There is also a recommendation from the circuit court for DOC to employ "a smaller and/or redesigned mouth strap." We conclude that there is competent, substantial evidence to support the circuit court's finding of fact that the execution protocol was not violated in the Davis execution. However, it may be appropriate for DOC to revisit the protocol, including the use of the mouth strap, to ensure that it is consistent with the functioning of the electric chair.

In issue two, Provenzano claims that Florida's current use of electrocution as its sole method of execution is unconstitutional because it violates the evolving standards of decency that mark the progress of a maturing society. This claim was rejected by this Court in *Jones*. *See* 701 So. 2d at 79.

In issue three, Provenzano claims that the circuit court made numerous erroneous evidentiary rulings during the evidentiary hearing,[1] thereby denying him a full and fair hearing. In *Heath v. State*, 648 So. 2d 660, 664 (Fla. 1994), this Court stated that "[t]he trial court has broad discretion in determining the relevance of evidence and such determination will not be disturbed absent an abuse of discretion." Provenzano has not demonstrated that the circuit court abused its discretion on these evidentiary rulings.

In issue four, Provenzano claims that the circuit court erred when it struck additional petitioners from Provenzano's petition for relief in this case. We find no merit to this issue. The order in this case directing the circuit court to hold an evidentiary hearing was specific as to the parties in this case. Further, a similar motion to intervene was denied by this Court in *Jones v. State*, No. 90,231 (order filed July 3, 1997).

Accordingly, for the reasons expressed in this opinion, we affirm the circuit court's order finding that the electric chair is not unconstitutional. No motion for rehearing will be permitted.

It is so ordered.

---

[1] Provenzano claims that the circuit court erred in ruling that the testimony of two potential witnesses (Thomas Crapps and Richard Martell) was precluded. Provenzano also claims that the circuit court erred in sustaining the State's objections to questions concerning certain testimony from witnesses Rabbani Muhammed and A.D. Thornton.

HARDING, C.J., and WELLS, LEWIS, and QUINCE, JJ., concur.

HARDING, C.J., concurs specially with an opinion, in which LEWIS, J., concurs.

WELLS, J., concurs with an opinion, in which QUINCE, J., concurs.

QUINCE, J., concurs specially with an opinion, in which WELLS, J., concurs.

SHAW, J., dissents with an opinion, in which ANSTEAD, J., concurs.

ANSTEAD, J., dissents with an opinion, in which SHAW, J., concurs.

PARIENTE, J., dissents with an opinion, in which ANSTEAD, J., concurs.

HARDING, C.J., specially concurring.

I write separately for two reasons. First, I write to explain the reasons that I concur with the majority opinion regarding the constitutionality of the electric chair. Second, I again urge the Legislature to offer lethal injection as an alternative method of execution.

I. Constitutionality of the Electric Chair

I agree with the majority in upholding the circuit court's findings regarding electrocution as a constitutional method of execution. While I am disturbed by the graphic photographs of Allen Lee Davis' body following his July 8, 1999, execution, I do not find this alone enough to deem electrocution "cruel or unusual" punishment.

"Since it is the *method* of execution that is challenged, it follows that a court must focus on the procedure as a whole and over time, rather than on any one particular execution." *Fierro v. Gomez*, 865 F.Supp. 1387, 1411 n.25 (N.D.Cal. 1994) (permanently enjoining California from executing inmates by lethal gas), *aff'd*, 77 F.3d 301 (9th Cir.) (affirming injunction based on district court's factual findings regarding pain), *vacated*, 519 U.S. 918 (1996) (vacating judgment and remanding for further consideration in light of California's subsequently amended death penalty statute providing that lethal injections should be used to carry out death sentences unless the defendant requests that the State use the gas chamber). As explained by the district court in *Fierro*, the key question to be answered in a challenge to the method of execution is how much pain the inmate suffers. *Id.* at 1411. Where "unconsciousness is 'likely to be immediate or within a matter of seconds' " the method is within constitutional limits. *Id.* (quoting *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994) (finding that Washington's execution by judicial hanging did not violate prohibition against cruel and unusual punishment)). The record in the instant case contains competent, substantial evidence to support the conclusion that Davis was rendered unconscious instantaneously when the current was applied. This Court may not arbitrarily overturn the circuit court's finding based upon conflicting evidence in the record. *See Shaw v. Shaw*, 334 So. 2d 13, 16 (Fla. 1976) ("It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test, as pointed out in *Westerman [v. Shell's City, Inc.*, 265 So. 2d 43

(Fla. 1972),] is whether the judgment of the trial court is supported by competent evidence.").

II. Lethal injection: The Need for Legislative Action

However, as I suggested in my concurring opinion in *Jones v. State*, 701 So. 2d 76, 80 (Fla. 1997) (Harding, J., specially concurring), I urge the Legislature to revisit this issue and pass legislation giving death row inmates the choice between lethal injection and electrocution as the method of carrying out the death penalty. *See* Art. I, § 17, Fla. Const. ("Methods of execution may be designated by the Legislature."); *see generally, e.g.*, Ariz. Rev. Stat. Ann. § 13-704(b) (West Supp. 1998) (defendant sentenced to death for offense committed prior to date of amended statute shall choose either lethal injection or lethal gas; execution by lethal injection if the defendant fails to choose method); Cal. Penal Code § 3604(b) (West Supp. 1999) (same); S.C. Code Ann. § 24-3-530(A) (Law Co-op. Supp. 1998) (election between electrocution and lethal injection; if defendant waives right of election, then penalty must be administered by lethal injection); Utah Code Ann. § 77-18-5.5 (1995) (election between firing squad and lethal injection; where no preference is stated, execution is by lethal injection); Va. Code Ann. § 53.1-234 (Michie 1998) (election between electrocution and lethal injection; lethal injection where prisoner fails to choose in timely manner); Wash. Rev. Code § 10.95.180(1) (1998) (death shall be inflicted by lethal injection unless defendant elects hanging).

Florida death row inmates almost routinely challenge electrocution as a cruel or unusual method of punishment. *See, e.g., Davis v. State*, 24 Fla. L. Weekly S345, (Fla. July 1, 1999), *cert. denied*, 68 U.S.L.W. 3136, (U.S. July 7, 1999), *and cert. denied*, 68 U.S.L.W. 3136, (U.S. July 7, 1999); *Remeta v. State*, 710 So.2d 543, 546 (Fla.), *cert. denied*, 118 S. Ct. 1383 (1998) *Jones v. State*, 701 So. 2d 76, 80 (Fla. 1997), *cert. denied*, 118 S. Ct. 1297 (1998); *Stano v. Singletary*, 692 So.2d 180, 181 (Fla. 1997). Such challenges consume an inordinate amount of the time and resources expended by inmates' counsel, State counsel, and judicial personnel. Furthermore, each time an execution is carried out, the courts wait in dread anticipation of some "unforeseeable accident" that will set in motion a frenzy of inmate petitions and other filings. *See Jones*, 701 So.2d at 76 n.1, 77 (discussing Pedro Medina's 1997 execution, where flames were seen near the headpiece of the electric chair and smoke emanated from under the headpiece; circuit court found that flame and smoke were caused by insufficient saline solution on the sponge in the headpiece of the electric chair); *Buenoano v. State*, 565 So.2d 309, 310-11 (Fla. 1990) (discussing flames and smoke that erupted from the headpiece of the electric chair during the 1990 execution of Jessie [sic] Tafero; investigation concluded that the irregularities in Tafero's execution were caused by the use of a synthetic sponge).

It is my view that the Legislature can foreclose many of these claims by simply amending Florida's death penalty statute to provide that death sentences should be carried out by lethal injection unless the defendant requests execution by electrocution. *See Fierro v. Terhune*, 147 F.3d 1158, 1160 (9th Cir. 1998) (finding that California

inmates lacked standing to challenge constitutionality of execution by lethal gas and claims were not ripe for decision where the inmates had not chosen execution by lethal gas); *Poland v. Stewart*, 117 F.3d 1094, 1104 (9th Cir. 1997) (finding that similar challenge to identical Arizona statute was not ripe because inmate had not chosen lethal gas as method of execution). While an inmate's choice of electrocution would not constitute a waiver of his or her Eighth Amendment protections and would not foreclose a constitutional challenge to this method of execution, *see LaGrand v. Stewart*, 173 F.3d 1144 (9th Cir. 1999), the alternative method of lethal injection would still be available even if a constitutional challenge of electrocution proved successful. *See id.* at 1149 (ordering that no inmates be executed by lethal gas and that inmate bringing challenge could not be executed pursuant to the existing death warrant which required execution by lethal gas, but also recognizing that warrant could be "reissued in a form that does not require execution by lethal gas").

Although not determinative of the Eighth Amendment claim, I find it significant that a number of other states that once relied on electrocution as the sole means of execution have now either entirely abandoned this method or offered an alternative. Nineteen of the states that currently permit capital punishment specified in 1970 that electrocution was the exclusive form of capital punishment. *See Fierro*, 865 F.Supp. at 1406. Today, of the thirty-eight states that permit capital punishment for the crime of first-degree murder, only four states rely on electrocution as the exclusive form of punishment. *See* Fla. Correct. Comm'n, *1997 Supplemental Report on Execution Methods Used by States* at 48 (June 20, 1997) (on file

with Library, Fla. Sup. Ct.) [hereinafter Commission Report]; Ky. Rev. Stat. Ann. § 431.220 (Michie Supp. 1998) (establishing lethal injection as the sole means of capital punishment for defendants receiving death sentence on or after March 31, 1998, and giving the choice of electrocution or lethal injection to those prisoners sentenced prior to March 31, 1998); Tenn. Code Ann. § 40-23-114 (Supp. 1998) (establishing lethal injection as the sole means of capital punishment for defendants receiving death sentence on or after January 1, 1999, and giving the choice of electrocution or lethal injection to those prisoners sentenced prior to January 1, 1999). In contrast, thirty-four states offer lethal injection either as a choice or as the exclusive form of punishment. *See* Commission Report at 48; Ky. Rev. Stat. Ann. § 431.220; Tenn. Code Ann. § 40-23-114. Clearly, the modern trend is towards rejecting electrocution as a method of capital punishment. In fact, in the 1997 report submitted to the Governor and the Legislature by the Florida Corrections Commission, the Commission recommended that Florida permit lethal injection as an alternative method of execution. *See* Commission Report at 28.

Finally, it is important to note that several courts, including the United States Supreme Court, have held that it is not an ex post facto violation to apply a change in execution methods retroactively. *See Malloy v. South Carolina*, 237 U.S. 180, 185 (1915); *Hernandez v. State*, 32 P.2d 18, 25 (Ariz. 1934) (upholding amendment to statute which changed method of capital punishment from hanging to lethal gas); *DeShields v. State*, 534 A.2d 630, 639 n.7 (Del. 1987) ("A statute which provides an optional method of death is not ex post facto legislation or an

unlawful bill of attainder."); *State ex rel. Pierre v. Jones*, 9 So. 2d 42, 46 (La. 1942) (upholding amendment to statute which changed method of capital punishment from hanging to electrocution); *State v. Fitzpatrick*, 684 P.2d 1112, 1113 (Mont. 1984) (upholding amendment to statute which allowed defendant to elect either lethal injection or hanging as the method of punishment); *Woo Dak San v. State*, 7 P.2d 940, 941 (N.M. 1931) (upholding amendment to statute which changed method of capital punishment from hanging to electrocution); *Ex parte Granviel*, 561 S.W. 2d 503, 510-11 (Tex. Crim. App. 1978) (upholding amendment to statute which changed method of capital punishment from electrocution to lethal injection); *In re Personal Restraint of Benn*, 952 P.2d 116, 149 n.19 (Wash. 1998) ("Retroactive application of a change in the method of execution does not violate the Ex Post Facto Clause where the change is to a more humane method."). In *Malloy*, the Supreme Court concluded that "[t]he statute under consideration did not change the penalty-death-for murder, but only the mode of producing this. . . . The punishment was not increased. . . . " 237 U.S. at 185. In *Weaver v. Graham*, 450 U.S. 24, 33 n.17 (1981), the United States Supreme Court further explained its decision in *Malloy*, wherein the Court stated, "In *Malloy v. South Carolina*, we concluded that a change in the method of execution was not ex post facto because evidence showed the new method to be more humane, not because the change in the execution method was not retrospective." (Citation omitted.) My research has not revealed a single state that has found the retroactive application of a more humane method of execution to be unconstitutional. This is true

even though the sentence imposed specifically called for the previous method of execution.

For all of the reasons expressed, I believe that the Legislature will only improve death penalty jurisprudence in Florida by amending our state's statute to permit inmates to choose between lethal injection and electrocution. This is the prudent and proper step for the Legislature to take.

LEWIS, J., concurs.

WELLS, J., concurring.

I concur in the majority opinion and the separate concurring opinion of Justice Quince. I write briefly to make two points.

First, the Davis nosebleed has not provided any basis for this Court to reexamine this issue. This Court, on July 8, 1999, sent this case to a trial judge because of allegations that the electric chair did not function as intended in the Davis execution. The trial judge made the factual determination that those allegations were unfounded. Therefore, there is no basis to disturb the decision that this Court so recently made in *Jones*.

Second, in respect to Chief Justice Harding's recommendation as to lethal injection, obviously the legislature can relieve further complications involved with the electric chair issues by changing the method of execution to lethal injection for those crimes committed after the effective date of the legislation. I join in the recommendation to that extent.

However, I have to acknowledge that there are legal issues with the changing of sentencing laws for the punishment of crimes committed prior to a change in the law. This Court has been repeatedly taught that lesson by the United States Supreme Court. In *Gomez v. Singletary*, 733 So. 2d 499 (Fla. 1998), the majority made this point, pointing to *Weaver v. Graham*, 450 U.S. 24 (1981), *Lynce v. Mathis*, 519 U.S. 433 (1997), *Calamia v. Singletary*, 117 S. Ct. 1309 (1997), and *State v. Lancaster*, 118 S. Ct. 37 (1997). A great number of prisoners presently on death row have been sentenced to death by judgments which specify use of the electric chair because their sentences conformed with the existing law. All have been sentenced on the basis of section 922.10, Florida Statutes, which states: "A death sentence shall be executed by electrocution."

Not only does this United States Supreme Court precedent present legal issues on a change of this Florida statute, the Florida Constitution presents a legal issue in article X, section 9, which states expressly: "Repeal or amendment of a criminal statute shall *not* affect prosecution or *punishment* for any crime previously committed." (Emphasis added.) Justice Shaw's dissent acknowledges this legal issue in its footnote 53, recognizing this Court's precedent in *Washington v. Dowling*, 92 Fla. 601, 109 So. 588 (1926), from which he states he would recede.

A change to lethal injection for inmates may be legally attainable based upon an express waiver by the prisoner of any contest as to the method of execution. However, such a change requires full study and awareness by the legislature of the legal issues. Consequently, I do not join those that recommend it without acknowledging the consequent legal issues and that those legal issues

will present matters for further litigation. I conclude that because of these outstanding legal issues the decisions as to this change are within the province of the legislature and are matters about which this Court cannot properly render an advisory opinion regardless of our personal views as to that decision.

QUINCE, J., concurs.

QUINCE, J., specially concurring.

I agree with the majority's determination that death by electrocution is not cruel and unusual punishment within the meaning of the Eighth Amendment. While there has been much said about the Davis execution because of the blood which dripped from the inmate's nostril during this process, the real question presented here is whether or not the use of electrocution violates the "evolving standards of decency" espoused by the United States Supreme Court in *Trop v. Dulles*, 356 U.S. 86 (1958). The answer to this question is not easy and involves the analysis of several factors including the use of the particular method by other states. Although electrocution as the judicial method of execution has been abandoned in a number of states in favor of, for the must part, lethal injection,[2] that factor does not dispose of the issue.[3]

---

[2] This supposed more "humane" method of execution has come under Eighth Amendment attack and I suspect will generate even more litigation over the next few years. *See Hunt v. Smith*, 856 F. Supp. 251 (D. Md. 1994), *aff'd sub nom. Hunt v. Nuth*, 57 F.3d 1327 (4th Cir. 1995).

[3] Only one state, Utah, uses the firing squad as its method of judicial execution.

In *Jones v. State*, 701 So. 2d 76 (Fla. 1997), *cert. denied*, 118 S. Ct. 1297 (1998), this Court reiterated its prior determination that death by electrocution is not per se cruel and unusual punishment under the Eighth Amendment. *See also Medina v. State*, 690 So. 2d 1241 (Fla.), *cert. denied*, 117 S. Ct. 1330 (1997). And, citing to *Hunt v. Nuth*, 57 F.3d 1327 (4th Cir. 1995), and *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), we indicated that the question of whether electrocution was unusual because it was used in only six states[4] was subsumed in the larger question of per se unconstitutionality. In *Hunt*, the court addressed the constitutionality of judicial execution by lethal gas[5] and, in *Campbell*, the court addressed judicial execution by hanging.[6]

In both cases the courts were asked to declare the methods of execution cruel and unusual because they were only used by a few states, and many states had abandoned the methods in favor of lethal injection.[7] In

---

[4] The use of electrocution as the sole method of judicial execution is now used in only four states: Alabama, Georgia, Florida and Nebraska.

[5] Lethal gas as a judicial method of execution is provided for in several states, including: Missouri and North Carolina. Both Maryland and California have now changed to lethal injection as the method of execution.

[6] Hanging as a method of execution takes place in only Washington and Montana, and in both states, lethal injection can be chosen by the defendant.

[7] In *Hunt v. Nuth*, 57 F.3d 1327, 1338 (4th Cir. 1995), the circuit court did not address, based on mootness grounds, the defendant's argument that execution by lethal injection violated the Eighth Amendment prohibition against cruel and unusual punishment because lethal injection violated federal drug laws

making the determination that neither lethal gas nor hanging was violative of the Eighth Amendment, the Ninth and Fourth Circuits looked to other objective factors when possible. In *Campbell*, the court stated:

> [M]ethodology review focuses more heavily on objective evidence of the pain involved in the challenged method. *See, e.g., Glass v. Louisiana*, 471 U.S. at 1084, 105 S. Ct. at 2162 (Brennan, J., dissenting) (noting that "[f]irst and foremost" among the "objective factors by which courts should evaluate the constitutionality of a challenged method of punishment" is whether the method involves " 'the unnecessary and wanton infliction of pain.' " (Citation omitted.)) The number of states using hanging is evidence of public perception, but sheds no light on the actual pain that may or may not attend the practice. We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice.

Campbell, 18 F.3d at 682 (footnote omitted). In *Hunt*, the court made a similar observation in reference to the use of lethal gas when it opined:

> Despite the court's thorough opinion,[8] we decline Hunt's invitation to become the first court to follow the reasoning in *Fierro*. Lethal

---

and could inflict cruel and inhumane treatment as a result of botched executions.

[8] The district court in *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994), *vacated sub nom. Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998), declared unconstitutional the California statute that required or permitted execution by lethal gas.

> gas currently may not be the most humane method of execution – assuming that there could be a humane method of execution – but the existence and adoption of more humane methods does not automatically render a contested method cruel and unusual. Before *Fierro*, a number of courts had held that execution by lethal gas did not violate the Eighth Amendment. Furthermore, we agree with the district court in Hunt's case that "graphic descriptions of the death throes of inmates executed by gas are full of prose calculated to invoke sympathy, but insufficient to demonstrate that execution by the administration of gas involves the wanton and unnecessary infliction of pain." *Hunt III*, 856 F. Supp. at 260; *see also Campbell*, 18 F.3d at 683.

Hunt, 57 F.3d at 1337-38 (citations omitted). Thus, both courts reject the notion that a method of execution is cruel and unusual because it is not a popular method.

Another objective criteria that the ninth circuit focused on was the role of the legislature in determining the appropriate punishment for crimes. The court in *Campbell*, quoting from *Gregg v. Georgia*, 428 U.S. 153 (1976), stated that a punishment selected by a duly elected legislature is presumed constitutional. This presumption holds true even if the legislature does not select the least severe penalty, so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. The Court in *Gregg* said:

> [T]he requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for

the Eighth Amendment is a restraint upon the exercise of legislative power.

> "Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not." *Furman v. Georgia*, 408 U.S., at 313-314 (White, J., concurring).

See also Id., at 433 (Powell, J., dissenting).

Gregg, 428 U.S. at 174. In evaluating the constitutionality of legislative action, the judiciary should not be swayed by its own individual notion of whether or not the particular judge would have chosen another course. Courts should instead give effect to the legislative enactment as a reflection of the will and the moral values of the people. However, while the laws and statutes enacted by the people's duly elected representatives are some evidence of contemporary values, again this is not determinative.

When drafting the Eighth Amendment, the framers of our constitution were primarily concerned with proscribing torturous or barbarous punishments. *See Furman v. Georgia*, 408 U.S. 238 (1972). As a consequence, the primary objective factor, in addition to legislative action, that bears on the issue of the constitutionality of a particular method of execution is whether or not that method involves the "unnecessary and wanton infliction of pain."

On that issue, in regards to the execution of Allen Lee Davis, the trial court found:

> Allen Lee Davis did not suffer any conscious pain while being electrocuted in Florida's electric chair. Rather, he suffered instantaneous and painless death once the current was applied to him.
>
> The nose bleed incurred by Allen Lee Davis began before the electrical current was applied to him, and was not caused whatsoever by the application of electrical current to Davis. This Court is unable to make a finding regarding the exact cause or situs of initial onset of the nose bleed because that information was not determined during either of the autopsies performed on Davis' body.
>
> The post-execution photographs of Allen Lee Davis indicate that the straps used to restrain Davis' body, specifically, the mouth strap and chin strap, may have caused Davis to suffer some discomfort. However, the straps did not cause him to suffer unnecessary and wanton pain, and the mouth strap was not a part of the electrical operation of the electric chair.

The trial court's findings are based on substantial competent evidence that was adduced at the evidentiary hearing and must be upheld. *See Tibbs v. State*, 397 So. 2d 1120 (Fla. 1981), *aff'd*, 457 U.S. 31 (1982). These findings support the trial court's ultimate conclusion that electrocution as a form of execution does not constitute cruel and unusual punishment.

In my estimation, little has changed since our analysis of this situation in *Jones v. State*. The pictures of the

blood generated by Davis's nosebleed are not pleasant. However, we must keep in mind that the nosebleed does not per se relate to the proper functioning of the electric chair. The two issues are not, under the circumstances of this case, intertwined.

I join in the trial court's suggestion to the Department of Corrections that the mouth strap should be replaced or other sizes used depending on the size of the inmate. Such a change, assuming the bleeding and the facial discoloration resulted from the placement of the mouth strap, should eliminate some of the "ghastliness" associated with the photographs of the Davis body, and eliminate some of the human error that seems to plague this form of execution.

For the reasons stated above, I would affirm the trial court's determination that Florida's use of electrocution as the sole method of execution is not cruel and unusual punishment.

WELLS, J., concurs.

SHAW, J., dissenting.

The overarching question presented in this case is whether continued use of electrocution as the official method of execution in Florida comports with the state and federal constitutions. This question has *not* been directly confronted by this Court in any case – despite a widespread belief that the issue has been duly decided. At most, this Court on one occasion has conducted a "snapshot" review of the execution apparatus, i.e., the electric chair, and concluded that use of the chair *at that point in time* did not violate the constitution because any

problems had been fixed and inmates suffered no conscious pain.[9] The Court did not address violence or mutilation or the per se constitutionality of electrocution as a mode of execution in Florida. That issue was procedurally barred:

> The claim that execution by electrocution is unconstitutional per se is hereby denied as *procedurally barred* as it could have been raised in previous petitions for relief.

Jones v. Butterworth, 691 So. 2d 481, 482 (Fla. 1997) (emphasis added).

In light of continuing malfunctions and mishaps with this method of execution in Florida, I am convinced that the time has now come to confront this issue head-on, and it is my conclusion that electrocution as it has been administered in Florida is unconstitutional. I would direct that the sentence in the present case be carried out by lethal injection as prescribed by statute.[10]

I. FACTS

Following the recent bloody execution of Allen Lee Davis on July 8, 1999, this Court remanded the present case to the trial court to conduct an evidentiary hearing on a single narrow issue – the present functioning of Florida's electric chair. At the conclusion of the hearing,

---

[9] *See Jones v. State*, 701 So. 2d 76 (Fla.1997), *cert. denied*, 118 S. Ct. 1297 (1998).

[10] *See* § 922.105(1), Fla. Stat. (Supp. 1998) ("If electrocution is held to be unconstitutional . . . all persons sentenced to death for a capital crime shall be executed by lethal injection.").

the trial court *inter alia* made two findings despite considerable evidence to the contrary: (1) Florida's electric chair functioned as intended during the Davis execution; and (2) Davis suffered no conscious pain. The court ruled as follows:

> Execution by electrocution in Florida's electric chair as it exists *in its present condition* as applied does not constitute cruel or unusual punishment, and therefore, is not unconstitutional.

(Emphasis added.) The court focused only on the question before it and did not address the issues of violence or mutilation or the overall record of electrocution as a method of execution in Florida.

The present majority opinion affirms the conclusion of the trial court, focusing on the present functioning of the chair and the lack of pain:

> This Court recently concluded in *Jones v. State*, 701 So. 2d 76, 79 (Fla. 1997), that "[i]n order for a punishment to constitute cruel or unusual punishment, it must involve 'torture or lingering death' or the infliction of 'unnecessary and wanton pain.' " (citing *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947)). The record in this case reveals abundant evidence that execution by electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain. The record also contains evidence that the electric chair is and has been functioning properly and that the electrical circuitry is being maintained.

Majority op. at 4. The majority opinion then proceeds to extrapolate from the narrow "snapshot" ruling of the trial court and concludes broadly that use of Florida's electric chair *in general* is not cruel or unusual punishment, citing *Jones v. State*, 701 So. 2d 76 (Fla. 1997):

> In *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), this Court stated, "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' " We find that the circuit court's findings of fact are supported by competent substantial evidence. Therefore, *we again conclude, as we did in Jones, that Florida's electric chair is not cruel or unusual punishment.*

Majority op. at 4-5 (emphasis added). The majority opinion summarily rejects Provenzano's "evolving standards of decency" claim, again citing *Jones:*

> In issue two, Provenzano claims that Florida's current use of electrocution as its sole method of execution is unconstitutional because it violates the evolving standards of decency that mark the progress of a maturing society. *This claim was rejected by this court in Jones. See* 701 So. 2d at 79.

Majority op. at 5 (emphasis added).

This reliance on *Jones* is misplaced. Contrary to what the majority opinion assumes, the trial courts both in *Jones* and the present case never reached the broad issue of the per se constitutionality of electrocution as a method of execution in Florida – that issue was beyond

the scope of the evidentiary hearings in both cases. Nor did this Court in *Jones* address this issue – for the issue was found to be procedurally barred.

II. FLORIDA'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE

Article I, section 17, Florida Constitution, proscribes punishments that are "cruel and unusual":

> SECTION 17. Excessive punishments. – Excessive fines, *cruel and unusual punishment*, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses *are forbidden*.

Art. I, § 17, Fla. Const. (emphasis added). The question posed in the present case is whether this prohibition bars the use of electrocution as the official method of execution in Florida.

The present majority opinion relies on *Jones v. State*, 701 So. 2d 76 (Fla. 1997), to resolve this issue. Following the fiery execution of Pedro Medina in 1997, this Court remanded Jones' case to the trial court to conduct an evidentiary hearing on the limited issue of whether use of Florida's electric chair in its then-current condition constituted "cruel or unusual" punishment. *Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997). The trial court found that the malfunction (an improperly moistened sponge in the head-piece) had been fixed, that the chair was now working properly, and that Medina had suffered no conscious pain. This Court affirmed.

This Court refused to consider Jones' contention that electrocution in general is unconstitutional under evolving standards of decency. The Court explained:

> Jones also argues that the trial judge erred in refusing to admit and consider evidence that execution in Florida is unusual because there is a trend away from execution through the use of the electric chair as a means of capital punishment and because only six states currently employ the electric chair as a means of execution. *The trial judge properly excluded this evidence as being beyond the scope of the issue which he had been assigned to decide. Our previous ruling that execution by the use of the electric chair is not per se unconstitutional subsumed the argument that Jones now makes. See Campbell v. Wood*, 18 F.3d 662, 682 (9th Cir. 1994) ("We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice."); *Hunt v. Nuth*, 57 F.3d 1327, 1338 (4th Cir. 1995) ("[T]he existence and adoption of more humane methods [of execution] does not automatically render a contested method cruel and unusual.").

Jones, 701 So. 2d at 79 (emphasis added) (footnote omitted). The Court ultimately held as follows: "We hold that electrocution in Florida's electric chair *in its present condition* is not cruel or unusual punishment." *Id.* at 80 (emphasis added).

It is clear from the above that this Court – and the trial court – did not address the issue of whether Medina suffered undue violence or mutilation or whether electrocution is constitutional as the traditional method of execution in Florida. Rather, the Court conducted a

"snapshot" review of the current functioning of Florida's electric chair – i.e., the Court limited its review to whether the electric chair was working properly *at that point in time* and whether Medina had suffered unnecessary pain. The Court disposed of Jones' per se constitutionality claim by referring to its earlier ruling in the case. ("Our previous ruling that execution by the use of the electric chair is not per se unconstitutional subsumed the [evolving standards of decency] argument that Jones now makes." *Id.*) A review of that earlier ruling, however, shows that *the Court never addressed the per se constitutionality issue on the merits but rather disposed of it procedurally.*[11] Nowhere in our two decisions in Leo Jones' case did the Court directly address this issue; it was never properly before the Court.

A review of this Court's death penalty precedent reveals that in those cases in which this issue was raised, the Court disposed of the matter in summary fashion without analysis.[12] The State points to no case from this

---

[11] *See Jones v. Butterworth*, 691 So. 2d 481, 482 (Fla. 1997) ("The claim that execution by electrocution is unconstitutional per se is hereby denied as *procedurally barred* as it could have been raised in previous petitions for relief." (Emphasis added.)).

[12] *See, e.g., White v. State*, 729 So. 2d 909, 911 & n.4 (Fla. 1999) (rejecting the constitutionality issue "as without merit"); *Remeta v. State*, 710 So. 2d 543, 546 (Fla.) (stating that defendant was entitled to "no relief" on the constitutionality issue), *cert. denied*, 118 S. Ct. 1383 (1998); *Elledge v. State*, 706 So. 2d 1340, 1347 & n.9 (Fla. 1997) (stating that the constitutionality issue had "already been decided adversely to Elledge"), *cert. denied*, 119 So. 2d 366 (1998); *Pooler v. State*, 704 So. 2d 1375, 1381 (Fla. 1997) (noting that the claim had been "previously rejected . . . as meritless"), *cert. denied*, 119 S.Ct. 119 (1998); *Hoskins v. State*, 702

Court where this method of execution was subjected to explicit constitutional scrutiny. Existing Florida precedent construing the Cruel and Unusual Punishment Clause in other situations offers little insight. Accordingly, this Court is obliged to turn to United States Supreme Court precedent for guidance.

III. FEDERAL CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

The Eighth Amendment to the United States Constitution bars punishments that are "cruel and unusual":

> Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*

U.S. Const. amend. VIII (emphasis added). This provision is of key importance in evaluating the lawfulness of a method of execution.

So. 2d 202, 208 (Fla. 1997) (rejecting the claim as "without merit" and noting the claim had been "repeatedly rejected" by this Court); *Consalvo v. State*, 697 So. 2d 805, 811-12 (Fla. 1996) (noting that the claim had been "previously rejected by this Court and do[es] not require additional discussion"), *cert. denied*, 118 S.Ct. 1681 (1998); *Hunter v. State*, 660 So. 2d 244, 253 (Fla. 1995) (ruling that the issue was procedurally barred, but even if not barred the issue had been rejected previously); *Fotopoulos v. State*, 608 So. 2d 784, 794 & n.7 (Fla. 1992) (finding that the claim was procedurally barred, but even if not barred the claim "lack[ed] merit").

A. The *Kemmler* Standard – "Mere Extinguishment of Life"

The United States Supreme Court last confronted a "method of execution" case in *In re Kemmler*, 136 U.S. 436 (1890), the case that inaugurated electrocution as a method of execution in this country.[13] That case is still the seminal case in this field and, contrary to popular belief, does not stand for the proposition that electrocution is per se lawful *ad infinitum* if there is no pain.[14] Rather, the Court in *Kemmler* simply acceded to the state court's finding that – given the available options at that point in time in the nineteenth century – electrocution was permissible as a more humane form of execution than hanging. As explained below, the enduring legal principle articulated in that case – i.e., the *Kemmler* standard – is far more broad and goes to the very heart of the Eighth Amendment.

The Court in *In re Kemmler*, 136 U.S. 436 (1890), was asked to invalidate New York's newly enacted statutory scheme, which replaced hanging with electrocution as the

---

[13] Prior to *Kemmler*, the United States Supreme Court addressed (with approval) shooting as a method of execution in the Territory of Utah. *See Wilkerson v. Utah*, 99 U.S. 130 (1878).

[14] *See generally Poyner v. Murray*, 508 U.S. 931, 933 (1993) (Souter, J., joined by Blackmun and Stevens, JJ., dissenting from denial of certiorari) ("The Court has not spoken squarely on the underlying issue since *In re Kemmler*, and the holding of that case does not constitute a dispositive response to litigation of the issue in light of modern knowledge about the method of execution in question."). I note that *Kemmler* was decided on a limited evidentiary basis – no one had yet been executed by electrocution.

official method of execution. The Court declined to invalidate the statute. First, the Court noted that death by hanging had been recognized by the governor of New York to be barbaric, and that the governor had called upon the state legislature to find a better method:

> It appears that the first step which led to the enactment of the law was a statement contained in the annual message of the governor of the State of New York, transmitted to the legislature January 6, 1885, as follows: "The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the legislature."

Id. at 444. Second, the Court pointed out that the state legislature had acted faithfully on the governor's commendation:

> The legislature accordingly appointed a commission to investigate and report "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." This commission reported in favor of execution by electricity, and accompanied their report by a bill which was enacted and became chapter 489 of the Laws of 1888.

Id. And finally, the Court noted that: (a) the state legislature had determined that electrocution was a more humane method of punishment; (b) the trial court had collected a "voluminous mass of evidence" on both sides of the issue and had reached the same conclusion, and (c)

the state courts at every level had agreed with that conclusion.

In addressing the Cruel and Unusual Punishments Clause in this context,[15] the United States Supreme Court set forth what has become known as the *Kemmler* standard. That standard, which bars anything more than "the mere extinguishment of life," is now the abiding criterion for evaluating the constitutionality of a method of execution:

> Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. *[Cruelty] implies . . . something inhuman and barbarous, – something more than the mere extinguishment of life.*

Id. at 447 (emphasis added). In short, to comport with the constitution, a method of execution is limited to "the mere extinguishment of life" – to the extent that this is reasonably possible. Any adverse effect beyond that point (i.e., any undue pain, violence, mutilation, or disgrace) is gratuitous and thus "inhuman and barbarous." The Court ultimately deferred to the state legislature's and courts' determination that electrocution was a more humane method of execution than hanging and declined to invalidate the New York statute. *Id.* at 449.

---

[15] The Cruel and Unusual Punishments Clause was inapplicable to the states at that time. *See Kemmler*, 136 U.S. at 446. *See also Robinson v. California*, 370 U.S. 660 (1962) (extending the Eighth Amendment to the states via the Fourteenth Amendment).

Although the United States Supreme Court has not confronted a "method of execution" case since *Kemmler*, the Court has ruled on a number of other government practices under the Cruel and Unusual Punishments Clause, as explained below. The *Kemmler* standard is reaffirmed in many of these cases. In reviewing these cases, a broad schematic for construing the Clause in "method of execution" cases emerges, embracing the following points: (1) While pain is a relevant indicator of cruelty, it is not the only indicator; (2) violence, mutilation, and disgrace are also relevant indicators of cruelty; and (3) the legal dimensions of cruelty are measurable against evolving standards of decency.

1. Undue Pain

In the olden days, a common component of punishments meted out by the crown was the intentional infliction of pain, violence, mutilation, and disgrace, for the crown viewed wanton cruelty as both a deterrent and a mode of vengeance and retribution. Upon our nation's birth, however, the Cruel and Unusual Punishments Clause was erected by the founding fathers as a resolute barrier to this repugnant practice, particularly where methods of execution were concerned.[16] While some

---

[16] Justice Brennan addressed this issue in *Glass v. Louisiana*, 471 U.S. 1080 (1985), reaffirming the *Kemmler* standard:

> The Court has *never* accepted the proposition that notions of deterrence or retribution might legitimately be served through the infliction of pain beyond that which is minimally necessary to terminate an individual's life. Thus in explaining the

degree of suffering is unavoidable in any means of taking life, the Clause focuses on any excessive cruelty which inheres in the method of execution – not that inevitable suffering which exists in the mind of the condemned.[17]

To meet the requirement that a punishment not be impermissibly cruel, a method of execution first of all must inflict no undue pain. As the United States Supreme Court stated: "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 463.

> obvious unconstitutionality of such ancient practices as disembowelling while alive, drawing and quartering, public dissection, burning alive at the stake, crucifixion, and breaking at the wheel, the Court has emphasized that the Eighth Amendment forbids "inhuman and barbarous" methods of execution that go at all beyond "the mere extinguishment of life" and cause "torture or a lingering death." It is beyond debate that the Amendment proscribes all forms of "unnecessary cruelty" that cause gratuitous "terror, pain, or disgrace."

Glass, 471 U.S. at 1084 (Brennan, J., dissenting from denial of certiorari) (citation and footnote omitted); *See also Gregg v. Georgia*, 428 U.S. 153, 173 (1976) ("[T]he punishment must not involve the unnecessary and wanton infliction of pain.").

[17] *See generally Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) ("The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.").

> The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death it self.

Id. at 474 (Burton, J., dissenting).

California's gas chamber has been found to be impermissibly cruel under this test, for while lethal gas as applied in California involves minimal violence and mutilation, it inflicts substantial pain (i.e., intense visceral pain from oxygen deprivation) and results in a slow, lingering death akin to artificial drowning (i.e., the inmate may remain conscious for several minutes) and thus is cruel in its effect.[18] Execution by gas is to be

---

[18] The United States Court of Appeals, Ninth Circuit, described the effects of lethal gas as applied in California:

> [I]nmates who are put to death in the gas chamber at San Quentin do not become immediately unconscious upon the first breath of lethal gas. . . . [A]n inmate probably remains conscious anywhere from 15 seconds to one minute, and . . . there is a substantial likelihood that consciousness, or a waxing and waning of consciousness, persists for several additional minutes. During this time, . . . inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells. The experience of "air hunger" is akin to the experience of a major heart attack, or to being held under water. Other possible effects of the cyanide gas include tetany, an exquisitely painful contraction of the muscles, and painful build-up of lactic acid and adrenaline. Cyanide-induced cellular suffocation causes anxiety, panic, terror, and pain.

Fierro v. Gomez, 77 F.3d 301, 308 (9th Cir.) (quoting *Fierro v. Gomez*, 865 F.Supp. 1387, 1404 (N.D.Cal.1994)), *vacated and*

distinguished from lethal injection, which is generally considered more humane.[19]

2. Undue Violence, Mutilation, and Disgrace

Although pain is an important indicator of cruelty, it is not the only indicator – for a method of execution can involve minimal pain and yet still be extraordinarily cruel. To meet the requirement that a punishment not be impermissibly cruel, a method of execution also must entail no undue violence, mutilation, or disgrace:

> The Eighth Amendment's protection of "the dignity of man" extends beyond prohibiting the unnecessary infliction of pain when extinguishing life. Civilized standards, for example, require a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. Similarly, basic notions of human dignity command that the State minimize "mutilation" and "distortion" of the condemned prisoner's body.

Glass, 471 U.S. at 1085 (Brennan, J., dissenting from denial of certiorari).[20]

---

remanded for reconsideration, 519 U.S. 918 (1996), *remanded*, *Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998).

[19] *See generally* Kristina E. Beard, Comment, *Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause*, 51 U. Miami L.Rev. 445, 465 (1997) ("By most accounts, lethal injection involves minimal pain, and there is little apparent violence or bodily mutilation.").

[20] *See also Campbell v. Wood*, 114 S. Ct. 2125, 2127 (1994) (Blackmun, J., dissenting from denial of certiorari) ("[P]ainless,

As conceded by the State in the present proceeding, the guillotine as used in the French Revolution is a prime example of a method that would fail in this regard, for while beheading results in a quick, relatively painless death,[21] it entails frank violence (i.e., gross laceration and blood-letting) and mutilation (i.e., decapitation) and disgrace (i.e., public spectacle) and thus is facially cruel. Post-execution disfigurement – e.g., dismemberment, disembowelment, decapitation, flaying, or dragging of the body – and displaying of the mutilated corpse similarly would be forbidden even though this practice involves no conscious pain. Forced public disrobing prior to execution also would be forbidden.

In the present case, the State in oral argument before this Court conceded that use of the guillotine as a method of execution would fail constitutional muster in all states under the Cruel and Unusual Punishments Clause. By this concession, the State – of necessity – agrees that there

---

post mortem punishments such as public display, drawing and quartering, and mutilation also violate the Eighth Amendment."); *Rupe v. Wood*, 863 F. Supp. 1307, 1315 (W.D. Wash. 1994) ("Supreme Court cases discussing the history of the Eighth Amendment make clear that decapitation and similar mutilation, even if accomplished after death and thus perhaps without 'unnecessary and wanton infliction of pain,' offend basic human dignity."); *Thomas v. Jones*, 742 F. Supp. 598, 603 (S.D. Ala. 1990) ("Every case the Court reviewed dealing with electrocution acknowledged that painful electrocution, *or* excessive burning and mutilation might violate the Eighth Amendment." (Emphasis added.)).

[21] *See generally* Robert J. Sech, Note, *Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods*, 30 Val. U.L.Rev. 381 (1995).

are other indicators of cruelty besides pain. I suggest that these additional indicators inhere in the method of execution. Thus far in Florida, we have suppressed any reasoned consideration of these additional factors by limiting the scope of the inquiry at the evidentiary hearings, wherein the courts have focused only on pain.

B. Evolving Standards of Decency

Subsequent to its decision in *Kemmler*, the United States Supreme Court concluded that the Constitution – in order to retain meaning and effect – must exist in our society as a dynamic force.[22] The Court then articulated a new standard for evaluating certain government practices under the Cruel and Unusual Punishments Clause – the "evolving standards of decency" criterion:

> The Court [has] recognized . . . that the words of the Amendment are not precise, and that their scope is not static. *The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.*

Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (emphasis added).[23] The Supreme Court has reviewed a number of government practices under this standard, including the

---

[22] *See Weems v. United States*, 217 U.S. 349, 373 (1910) ("In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.").

[23] The Court in *Trop* held that forced relinquishment of citizenship as punishment for misconduct while in the military violates the Eighth Amendment.

imposition of the death penalty for various offenses.[24] This review generally includes three considerations: (1) Whether the practice has been approved, rejected, or abandoned in other states;[25] (2) whether the practice has been approved, rejected, or abandoned by the governments of other civilized nations;[26] and (3) whether other less cruel modes of punishment are available.[27]

---

[24] *See, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that it is not cruel and unusual to execute the mentally retarded); *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that it is cruel and unusual to execute the insane); *Enmund v. Florida*, 458 U.S. 782 (1982) (holding the death penalty disproportionately cruel and unusual when imposed for aiding and abetting a robbery resulting in murder); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding the death penalty disproportionately cruel and unusual when imposed for the crime of rape).

[25] *See, e.g., Coker.*

[26] *See, e.g., Trop.*

[27] Justice Powell noted the following in *Furman v. Georgia*, 408 U.S. 238 (1972):

> Neither the Congress nor any state legislature would today tolerate pilloryings, branding, or cropping or nailing of the ears – punishments that were in existence during our colonial era. Should, however, any such punishment be prescribed, the courts would certainly enjoin its execution. Likewise, *no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.*

Id., 408 U.S. at 430 (Powell, J., dissenting) (citation and footnote omitted) (emphasis added). Justice Powell's views in *Furman* were largely adopted by the Court in *Gregg v. Georgia*, 428 U.S. 153 (1976).

C. Analysis Used by Lower Federal Courts

Unlike the United States Supreme Court, the lower federal courts have ruled on the constitutionality of several methods of execution in recent years. The analytical model that emerges from these rulings has two steps. The court first determines whether a method of execution is limited to "the mere extinguishment of life." If the method is not so limited and entails adverse effects beyond that point, the court then must determine if these effects are "undue." To assist in this second step, the court may apply the "evolving standards of decency" criterion. Two federal circuit court cases are instructive.[28]

The Ninth Circuit in *Campbell v. Wood*, 18 F.3d 662 (9th Cir.1994), upheld the State of Washington's alternative method of execution,[29] hanging, against a challenge under the Cruel and Unusual Punishments Clause.[30]

---

[28] In two additional cases, the federal circuit court reviewed a method of execution but did not conduct an in-depth constitutional analysis. In both cases, there had been no evidentiary hearing below, and the circuit court deferred to precedent approving the method under review. *See Hunt v. Nuth*, 57 F.3d 1327 (4th Cir. 1995) (upholding lethal gas in Maryland); *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983) (upholding lethal gas in Mississippi).

[29] Under the Washington scheme at that time, a defendant could choose the method of execution, either hanging or lethal injection, with the default falling to hanging. *See* Wash. Rev. Code 10.95.180(1) (1994). This statute was later amended to allow the default to fall to lethal injection. *See* Wash. Rev. Code 10.95.180(1) (1994).

[30] *But see Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994) (holding that execution by hanging under the Washington protocol presented a substantial risk of decapitation for Rupe,

After conducting an evidentiary hearing on the issue, the trial court noted two points: (1) Hanging in Washington is conducted pursuant to "Field Instruction WSP 410.500," an exhaustively detailed execution protocol adopted from the military; and (2) after adoption of the protocol, the only hanging conducted in the state had been performed flawlessly several years earlier.[31] *Campbell*, 18 F.3d at 683, 685. The trial court then concluded that "hanging according to the protocol does not involve lingering death, mutilation, or the unnecessary and wanton infliction of pain." *Id.* at 687. The circuit court deferred to the trial court's findings and declined to conduct an "evolving standards of decency" analysis. *Id.* at 682. There was no point in looking at other states; execution by hanging as carried out in Washington *clearly* entailed no undue pain or mutilation.[32]

Two years later, the Ninth Circuit in *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996), held California's alternative

---

who was obese, and thus violated the Cruel and Unusual Punishments Clause). The district court's decision in *Rupe* was vacated on appeal after the Washington Legislature amended the statute (which offered a choice of method – hanging or lethal injection – with the default falling to hanging) to allow the default to fall to lethal injection. *See Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996).

[31] Westley Allan Dodd was the only person to be executed by hanging in the United States since 1963. *See Campbell*, 18 F.3d at 700 (Reinhardt, J., dissenting).

[32] *But see Campbell v. Wood*, 511 U.S. 1119, 1120-21 (1994) (Blackmun, J., dissenting) (contending that the Ninth Circuit should have conducted an analysis under the "evolving standards of decency" criterion).

method of execution,[33] lethal gas, unconstitutional. The trial court had conducted an eight-day bench trial on the issue and concluded that lethal gas as applied in California resulted in extreme physical pain. The circuit court again deferred to the trial court's findings and declined to conduct an "evolving standards of decency" analysis. *Id.* at 308. There was no point in looking at other states; execution by lethal gas as carried out in California *clearly* entailed undue pain.

Although the Ninth Circuit in both *Campbell* and *Fiero* declined to apply the "evolving standards of decency" criterion, this was due to the particular facts of those cases. In the eyes of the court, the proper result in each case was clear-cut and was dictated by circumstances in the home state. The court did *not* hold that the "evolving standards of decency" criterion could never be used in a "method of execution" case – for logic suggests that the criterion would be helpful in a case where the constitutionality *vel non* of the method is not clear-cut (which is the situation in the present case).

IV. THREE RECENT EXECUTIONS

The administration of electrocution in Florida demonstrates the cruelty inherent in this method of execution. Not only was every execution in Florida accompanied by

---

[33] Under the California scheme at that time, a defendant could choose the method of execution, either lethal gas or injection, with the default falling to lethal gas. Cal. Penal Code § 3604(b) (West Supp. 1995). This statute was later amended to allow the default to fall to lethal injection. Cal. Penal Code § 3604(b) (West Supp. 1996).

the inevitable convulsing and burning that characterizes electrocution,[34] but further, three executions in particular were marred by extraordinary violence and mutilation. In two of these executions, smoke and flames spurted from the headpiece and burned the heads and faces of the inmates. In the third execution, the inmate bled from the nostrils and was at least partially asphyxiated by the restraining devices; and he too was burned.

A. Tafero's Execution

Florida's electric chair malfunctioned during the execution of Jesse Tafero on May 4, 1990, resulting in a violent scene, with smoke and foot-long flames spurting from his head. This Court described the scene:

> When Tafero's execution began, smoke and flames instantaneously spurted from his head for a distance of as much as twelve inches. The flames and smoke emanated from the area around a metallic skull cap, inside of which was a saline-soaked synthetic sponge meant to increase the flow of electricity to the head. The cap is the source of electricity administered to condemned prisoners by the electric chair.
>
> Because of the smoke and flames, officials of the Department of Corrections stopped the first surge of electricity. A second jolt again resulted in smoke and flames spurting from Tafero's head. Finally, a third jolt of electricity was administered. A medical examiner found that

---

[34] *See generally Jones*, 701 So. 2d at 82-88 (Shaw, J., dissenting).

> Tafero was dead some six or seven minutes after the execution commenced.
>
> Thereafter, the Governor ordered the Department of Corrections to conduct an investigation into the circumstances of Tafero's execution. The Department reported that the equipment was in proper working order. However, it was determined that for the first time a synthetic, rather than a natural, sponge had been used in the headpiece. The Department concluded that the burning of the sponge caused the flames and smoke which were seen during Tafero's execution. . . . The Department . . . noted that most executions last longer than seven minutes.

Buenoano v. State, 565 So.2d 309, 310-11 (Fla.1990).

The mutilated condition of Tafero's body was described in the sworn statement of a witness:

> I have seen the bodies of three other inmates executed by officials of the Florida State Prison. I saw them at approximately the same length of time after they were executed as I saw Mr. Tafero's body. None of the other bodies I saw before had the severe burning and scorching and damage to the head as did Mr. Tafero's. None had any marks on the face at all.
>
> The entire top of Mr. Tafero's head is covered with wounds. There is one dominant charred area and a myriad of smaller gouged, raw areas to the upper right side and lower right of the large burned area.
>
> The dominant charred area is on the top left side of the head. It is larger than my hand. . . . The funeral director said that this was a third

> degree burn. The rest of that area was a dark brownish color, slightly lighter than the charred area. The funeral director said that this would be a second degree burn.

Id. at 314 (Kogan, J., dissenting). Additionally, Tafero's eyebrows, eyelashes, and facial hair were burned when flames licked his face. *See Jones*, 701 So. 2d at 87 (Shaw, J., dissenting).

B. Medina's Execution

Florida's electric chair malfunctioned again during the execution of Pedro Medina on March 25, 1997, resulting in another violent scene with smoke and flames spurting from the head-piece. Unlike Tafero, Medina's eyebrows, eyelashes, and facial hair were not burned off. However, Medina's head was charred and his face was scalded. The trial court in Jones described the execution:

> When Pedro Medina was executed on March 25, 1997, the following events occurred. When the electrical current was activated, within seconds . . . smoke emanated from under the right side of Medina's head piece, followed by a 4 to 5 inch yellow-orange flame which lasted 4 to 5 seconds and then disappeared. After the flame went out, more smoke emanated from under the head piece to the extent that the death chamber was filled with smoke – but the smoke was not dense enough to impair visibility in or through the chamber. The smoke continued until the electrical current was shut off in the middle of the third cycle. Although several witnesses to the execution tried to describe the odor of the smoke, only one witness, Florida State Prison Superintendent Ronald McAndrews,

> described the odor as burnt sponge. . . . This Court finds that the odor smelled was burnt sponge, not burnt flesh.
>
> The physician's assistant, William Mathews, examined Medina's body. At that time, Medina was not breathing or exchanging air through his nostrils; his pupils were fixed and dilated; and he had an agonal pulse and heart sounds. When the physician's assistant was no longer able to detect any pulse or heart sounds, the attending physician, Dr. Almojera, examined Medina and pronounced him dead at 7:10 a.m. During Dr. Almojera's last examination Medina's chest was seen to move two or three times in a two to four minute period. A couple of witnesses thought Medina was trying to breathe. Several witnesses did not describe it as attempted breathing, but as a lurching, spasmodic movement, a shudder, and outward not upward movement. No witness, particularly those closest to Medina, could state that he was in fact breathing or attempting to breathe.

Jones, 701 So. 2d at 86 (Shaw, J., dissenting).

As with Tafero's body, Medina's body also was mutilated by the electrocution. The findings of the pathologists who conducted the autopsy of Medina were summarized by the trial court in Jones:

> 1. The head had a "burn ring" on the crown of the head that was common in executions by judicial electrocution.
>
> 2. Within the "burn ring" there was a third degree burn on the crown of the head, with deposits of charred material. . . .

> 3. There was a first degree burn of the upper front face and head, caused by scalding steam. . . . Unlike the Tafero execution, Medina had no burning of the eyebrows, eyelashes, or small hairs of the face that would have resulted if the burning had been the result of a flame rather than steam.

Jones, 701 So. 2d at 86-87 (Shaw, J., dissenting).

C. Davis' Execution

The execution of Allen Lee Davis on July 8, 1999, differed from prior executions in that here Department of Corrections ("DOC") officials took post-execution color photos of Davis before he was removed from the electric chair. (Several of the photos are appended to this dissenting opinion.) These photos, when combined with eye witness accounts, provide a vivid picture of a violent scene. According to witnesses' accounts, when Davis was being strapped into the chair, guards placed a solid leather mouth-strap across his mouth and nose area. This mouth-strap is wide – approximately five inches from top to bottom – and it covered the entire lower portion of Davis's face from the bottom of his chin to immediately below his nose.[35] The strap was fastened so tightly against his face and was so wide that it pushed his nose severely upward, blocking his nostrils at least partially. A

---

[35] The "mouth-strap" in fact appears to be a weight-lifter's belt or some such item. In the photos, the belt is turned backwards, so that the wide portion, which normally would support the back of the weight lifter, is placed over Davis' face. The belt is then run behind two wood rails at the back of the electric chair and buckled behind the chair.

heavy fabric face-mask was placed on top of this apparatus, further occluding his airway. And then, as explained below, blood began flowing from his nose prior to electrocution. This too obstructed his nostrils.

The trial court below explained that the pathologist who conducted a post-execution autopsy on Davis concluded that he had been at least partially asphyxiated prior to electrocution:

> Robert Kirschner, M.D., forensic pathologist from Illinois, testified as an expert in the area of forensic pathology. Kirschner testified that he performed an autopsy on the body of Allen Lee Davis. He testified that during Davis's autopsy, he was unable to identify the precise source of the nose bleed that Davis suffered, but that it was coming from the septal area of the left nostril. *Kirschner testified that the placement of the mouth strap across Davis' mouth inhibited Davis' breathing and caused him to become at least partially asphyxiated before the application of electrical current to him. Kirschner testified that he is of the opinion that Davis' death was caused by electrocution and association of partial asphyxiation which occurred before the electrocution.* . . .
>
> . . . .
>
> Aubrey D. Thornton, Assistant Warden at Florida State Prison, testified that he was one of the individuals responsible for strapping Allen Lee Davis into the electric chair. . . . *Thornton also testified that Davis' face began to turn red after the mouth strap was applied to him.* . . .

(Emphasis added.) After Davis' airflow had been blocked by the mouth-strap, the face-mask, and his own blood,

Davis made several sounds under the face-mask which were described variously as muffled screams, moans, or yells, as if he were attempting to get the guards' attention. The trial court gave the following description:

> John W. Moser, Capital Collateral Regional Counsel for the Middle Region, testified that in his capacity as Capital Collateral Regional Counsel, he witnessed the execution of Allen Lee Davis. Moser testified that between the time Davis was secured in the electric-chair and the time the electrical current was applied to Davis, *he heard what sounded like two screams from Davis.* . . .
>
> Mark Lazarus, Victim Assistance Administrator for the Florida Department of Corrections, testified that he observed the execution of Allen Lee Davis. Lazarus testified that after the head piece was placed on Davis' head, *he heard two one-syllable sounds coming from Davis and that the sounds sounded like Davis was trying to "make some noise" or "yell out."* . . .
>
> . . . .
>
> Thomas Varnes, Warden at Wakulla Correctional Institution, testified that he witnessed the execution of Allen Lee Davis. Varnes testified that after the mouth strap and chin strap of the head piece were tightened and the face mask was lowered, *he heard Davis moan like he was trying to say something.* . . .
>
> . . . .
>
> James Crosby, Warden of Florida State Prison testified that after the mouth piece was placed on Davis, and just before the execution,

> *he heard two muffled sounds from Davis, which sounded like Davis was trying to say something.*

(Emphasis added.)

Prior to and during the electrocution, blood flowed freely from Davis' nose, ran over the mouth-strap, and spilled onto his chest, forming a pool the size of a dinner plate on his white shirt. Again, in the words of the trial court below:

> Sheila McAllister, Correctional Probation Officer at Wakulla Correctional Institution, testified that she witnessed the execution of Allen Lee Davis. . . . McAllister also testified that while the current was on *she observed blood on Davis' chest, and she observed something dripping from behind Davis' mask.*
>
> . . . .
>
> Michael R. Collins, employed with Florida State Prison as a nurse, testified that he attended the execution of Allen Lee Davis. . . . Collins further testified that after the electrical current was stopped and after Mr. Matthews, the Florida State Prison physician's assistant, was examining Davis, *he observed blood on Davis' shirt in his chest area and on his upper right side, by his collar. Collins stated that the blood was dripping from under the mask.* . . .
>
> . . . .
>
> William Muse, Lieutenant with the Florida Department of Corrections, assigned to Florida State Prison, testified that he witnessed the execution of Allen Lee Davis. . . . Muse testified

> that after the cycle of current had been terminated, *he observed blood on Davis' shirt, blood on the strap, and blood coming from Davis' nostril[s].*

(Emphasis added.) In light of the placement of the mouth-strap, the positioning of the face-mask, and the flow of blood from his nostrils, it is reasonable to conclude – as did Dr. Kirschner – that Davis was being smothered before he was electrocuted.

And finally, as with Tafero and Medina, Davis' body was mutilated by burns on the head, face, and leg, as noted in the trial court's order:

> The deposition of William Hamilton, M.D., Medical Examiner for the Eighth Judicial Circuit, was read into the record due to Hamilton's unavailability. . . . Hamilton testified that *Davis had burns on his scalp and forehead, on his superpubic and right upper medial thigh region, and behind the right knee.*

(Emphasis added.)

The color photos taken by DOC show a ghastly post-execution scene: Davis is wearing a white shirt and dark pants and is restrained in the wooden chair by thick leather straps placed across his arms, legs, torso, and mouth; the electrical head-piece is attached to the top of his head with a leather strap that runs under his chin; a sponge placed under the head-piece obscures the entire top portion of his head down to his eyebrows; because of the width of the mouth-strap, only a small portion of Davis' face is visible above the mouth-strap and below the sponge, and that portion is bright purple and scrunched tightly upwards; his eyes are clenched shut and his nose is pushed so severely upward that it is

barely visible above the mouth-strap; although the exterior openings of Davis' nostrils are partially visible, it appears as though the interior openings may be covered by the mouth-strap; a stream of blood pours from his nostrils, flows over the wide leather mouth-strap, runs down his neck and chest, and forms a bright red pool (approximately eight by twelve inches) on his white shirt. The scene is unquestionably violent.

V. ELECTROCUTION IN FLORIDA IS UNCONSTITUTIONALLY CRUEL

As noted above, the abiding standard for determining the constitutionality of a method of execution is the "mere extinguishment of life" standard set forth in *In re Kemmler*, 136 U.S. 436 (1890). Execution by electrocution as administered in Florida violates this standard because it entails undue violence and mutilation. Additionally, execution by electrocution as practiced in Florida is inconsistent with evolving standards of decency.

A. Electrocution Violates the *Kemmler* Standard

Although a total of twenty executions were carried out "successfully" in the intervening years between the Tafero, Medina, and Davis executions, this statistic is insufficient to save Florida's method of execution from constitutional infirmity. In even the "successful" executions, the inmate was subjected to violence (i.e., the inmate was administered an electrical force that caused him to convulse violently) and mutilation (i.e., the body of each inmate was burned on the head and leg as a result

of the electrocution process). Additionally, in three out of twenty-three executions, i.e., *in thirteen percent of executions*, the prisoner was subjected to extreme violence and mutilation when the execution was botched.[36]

In two of these botched executions (Tafero and Medina), the prisoner was engulfed in smoke and flames when the switch was pulled. The head of one prisoner (Tafero) was burned and charred, his face was licked by flames, and his eyebrows, eyelashes, and facial hair were burned; his head also was gouged and made raw with wounds. The head of another (Medina) was burned and charred and his face was scalded. In the third botched execution (Davis), the prisoner suffered blood flowing from his nose and pooling on his chest; he was likely asphyxiated at least partially prior to electrocution, and he attempted to scream or yell after his airway was occluded; he too was burned on his head, face, and leg.

Each of the botched executions was sufficiently egregious to halt further executions and to prompt an extensive official inquiry, complete with an evidentiary hearing and voluminous testimony by eye witnesses and experts. Each botched execution also was transformed by the media into a world-wide spectacle, telecommunicated throughout the world in lurid and inflammatory detail.

Following the Tafero execution, the federal district court in Florida addressed the issue of repeated mishaps:

---

[36] *See Thomas v. Jones*, 742 F. Supp. 598, 603 (S.D. Ala. 1990) (acknowledging that excessive burning and mutilation during electrocution would implicate the Eighth Amendment).

> If a pattern of malfunctions develops, perhaps even as few as two consecutive or nearly consecutive executions, then it may become appropriate to consider whether the application of electrocution in Florida is infected with "an element of cruelty."

Hamblen v. Dugger, 748 F. Supp. 1498, 1504 (M.D. Fla. 1990). The Tafero, Medina, and Davis executions have now established a pattern of impermissible violence and mutilation.[37]

It is clear on the record before this Court that execution by electrocution as carried out in Florida is not limited to "the mere extinguishment of life" as required under *Kemmler*, for this method of execution entails undue violence and mutilation. This is particularly clear in light of the continuing – and apparently unavoidable – mishaps involving Florida's electric chair. The punishment that is actually meted out by DOC officials differs in kind from the simple sentence of death that the constitution permits and that was recommended by the penalty phase juries and ordered by the courts. Execution by electrocution as administered by DOC in Florida violates *Kemmler*.

---

[37] *See also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring) ("The fact that I reach this conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions."); *Squires v. Dugger*, 794 F. Supp. 1568, 1580 (M.D. Fla. 1992) ("Absent a showing establishing a pattern of malfunctions in the operation of the electric chair, the Court cannot conclude that unnecessary pain is being inflicted during executions in the Florida electric chair.").

B. Electrocution Violates Evolving Standards of Decency

Execution by electrocution as administered in Florida also violates the "evolving standards of decency" criterion for several reasons. First, this practice, which was inaugurated in New York more than a century ago as a humane alternative to hanging, has been abandoned by scores of states and is now the sole method of execution in only three other states.

> Electrocution was first adopted by a state as a method of execution in 1888 and last adopted in 1949, at which time twenty-six states used it; since 1949 (i.e., almost half a century ago), no state has adopted electrocution and twenty states have dropped it; of thirty-eight states that currently authorize execution, only six (Alabama, Florida, Georgia, Kentucky, Nebraska, and Tennessee) require electrocution; of these six, two (Kentucky and Tennessee) have not executed any prisoners since the United States Supreme Court lifted its ban on capital punishment in 1976; four additional states (Arkansas, Ohio, South Carolina, and Virginia) offer electrocution as an option; of these four, one (Ohio) has not executed any prisoners since 1976. . . .

Jones, 701 So. 2d at 87 (Shaw, J., dissenting).[38]

Second, execution by electrocution is practiced *in no other country in the world*:

---

[38] Both Kentucky and Tennessee have recently switched from electrocution to lethal injection as the official method of execution. *See* Ky. Rev. Stat. Ann. § 431.220 (Mitchie Supp. 1998); Tenn. Code Ann. § 40-23-114 (Supp. 1998).

> [O]f approximately 140 countries outside the United States that impose capital punishment, none impose electrocution; in short, only four governments in the entire world (Alabama, Florida, Georgia, and Nebraska) impose electrocution exclusively. . . .

Id. (emphasis omitted). As a postscript, I note that both the Humane Society of the United States and the American Veterinarian Medical Association condemn electrocution as a method of euthanasia for animals. *See id.* Third, other less cruel methods of execution are available; lethal injection is readily available (it has already been approved by the Florida Legislature[39]) and is generally considered more humane.[40]

And finally – and most telling – the governmental body charged with oversight of Florida's execution apparatus, the Florida Corrections Commission,[41] has recommended that Florida switch from electrocution to lethal injection. In the wake of the botched executions of Tafero and Medina, the Commission undertook an exhaustive survey of execution methods in other states and reported to the Governor and Legislature:

> We found that almost all states have written procedures regarding the execution process, and that numerous states had recently changed to lethal injection from electrocution because it was considered to be a "more humane method

---

[39] *See* § 922.105(1), Fla. Stat. (Supp. 1998) ("If electrocution is held to be unconstitutional . . . all persons sentenced to death for a capital crime shall be executed by lethal injection.").

[40] *See supra* note 11.

[41] *See* § 20.315(6), Fla. Stat. (1997).

> of execution." While the report notes problems encountered in the past with almost all methods of execution, including lethal injection, *the Commission recommends that Section 922.10, Florida Statutes, be amended to allow lethal injection as an alternative method of execution,* in addition to electrocution, for those persons currently on a sentence of death. Furthermore, for persons whose crimes are committed on or after the effective date of such legislation, lethal injection would be the only method of execution, thereby "phasing out" the use of the electric chair in Florida.
>
> *The Florida Corrections Commission believes that Florida has an obligation to ensure that modern technologies keep pace with the level of competence in this area, and, just as changes have occurred in Florida's past in carrying out the death penalty, changes should again occur.*

Jones, 701 So. 2d at 82 (Kogan, C.J., dissenting) (emphasis omitted and added). Unfortunately, unlike the New York Legislature a century ago in *Kemmler*, the Florida Legislature has failed to heed the state's own experts and switch to the more humane method.

VI. SOLE METHOD OF EXECUTION

Section 922.10, Florida Statutes (1997), provides that a death sentence in Florida shall be carried out by electrocution:

> 922.10 Execution of death sentence; executioner. – A death sentence shall be executed by electrocution. The warden of the state prison shall designate the executioner. . . . The warrant authorizing the execution shall be read to the convicted person immediately before execution.

§ 922.10, Fla. Stat. (1997). The statutory scheme makes no provision for an alternative method of execution, unless electrocution is declared unconstitutional.[42]

Because electrocution is the sole means of execution approved for use at this time in Florida, the constitutional infirmities inherent in this method cannot be avoided by the availability of a more humane alternative:

> Florida's electric chair, by its own track record, has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber of Florida State Prison. Because electrocution is the sole means of execution approved for use in Florida, the legislature has, so to speak, placed all its constitutional eggs in this one basket. As a result, any infirmity in this method cannot be mitigated at this time by the presence of an acceptable alternative. Such an all-or-nothing approach has proved fatal to the capital sentencing scheme in other states.

Jones, 701 So. 2d at 87-88 (Shaw, J., dissenting).

Both the California and Washington legislatures attempted to circumvent this same problem by implementing a death penalty scheme that offered capital defendants a choice in method of execution. California's statutory scheme originally offered a choice in method (lethal gas or injection) but called for the default to fall to lethal gas.[43] After the federal circuit court declared the

---

[42] *See* § 922.105, Fla. Stat. (Supp. 1998) ("If electrocution is held to be unconstitutional . . . all persons sentenced to death for a capital crime shall be executed by lethal injection.").

[43] *See* Cal. Penal Code § 3604(b) (West Supp. 1995).

original scheme unconstitutional under the federal Cruel and Unusual Punishments Clause because lethal gas is impermissibly cruel,[44] the state sought review in the United States Supreme Court. The California legislature promptly amended the statute to allow the default to fall to lethal injection.[45] Based on this legislative action, the United States Supreme Court vacated the circuit court decision and remanded for reconsideration.[46] Subsequently, a different capital defendant elected to be executed by lethal gas and then challenged that method anew. The circuit court reaffirmed its earlier ruling that execution by lethal gas is unconstitutional and enjoined the execution.[47]

In the State of Washington, the legislature took a similar tack when confronted with an adverse court ruling concerning its official method of execution – death by hanging. The Washington scheme originally had offered a choice (death by hanging or lethal injection), with the default falling to death by hanging.[48] After the federal

---

[44] *See Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996).

[45] *See* Cal. Penal Code § 3604(b) (West Supp. 1996).

[46] *Gomez v. Fierro*, 519 U.S. 918 (1996). *See also Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998) (holding on remand that because Fiero had not yet chosen to be executed by lethal gas, he lacked standing to challenge the constitutionality of that method of execution and the claim was not ripe for decision). *Cf. Poland v. Stewart*, 117 F.3d 1094 (9th Cir. 1997) (holding that constitutional challenge to execution by lethal gas in Arizona was not ripe for decision because the defendant had not yet chosen that method of execution).

[47] *LaGrand v. Stewart*, 173 F.3d 1144 (9th Cir. 1999).

[48] *See* Wash. Rev.Code 10.95.180(1) (1994).

district court ruled that hanging was unconstitutional if applied to an inmate who was obese,[49] the state appealed. The Washington Legislature promptly amended the statute to allow the default to fall to lethal injection, and the federal circuit court dismissed the appeal as moot.[50]

VII. LETHAL INJECTION

Although electrocution has been the sole method of execution in this state since 1924, the legislature recently passed legislation that does two things: (1) It provides that no sentence of death shall be reduced if a method of execution is declared unconstitutional; and (2) it authorizes the use of lethal injection if electrocution is declared unconstitutional.

Section 775.082(2), Florida Statutes (1997),[51] has been amended to provide that no sentence of death shall be

---

[49] *Rupe v. Wood*, 863 F.Supp. 1307 (W.D. Wash. 1994).

[50] *See* Wash. Rev. Code 10.95.180(1) (1998). *See also Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996) (vacating district court decision in light of subsequent legislative enactment).

[51] Prior to being amended, section 775.082, Florida Statutes (1997), provided as follows:

> 775.082 Penalties; mandatory minimum sentences for certain reoffenders previously released from prison. –
>
> (1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

reduced to life if a method of execution is held to be unconstitutional:

> 775.082 Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison. –
>
> (1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.
>
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). *No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional*

> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

§ 775.082, Fla. Stat. (1997).

under the State Constitution or the Constitution of the United States.

§ 775.082(1)-(2), Fla. Stat. (Supp.1998) (emphasis added).

Although section 922.10, Florida Statutes (1997) (calling for execution by electrocution),[52] remains unchanged, chapter 922 has been amended to provide that if electrocution is held to be unconstitutional, then all capital defendants shall be executed by lethal injection:

> 922.105 Execution of death sentence by lethal injection if death by electrocution is declared unconstitutional; prohibition against reduction of death sentence as a result of determination that a method of execution is unconstitutional. –
>
> (1) A death sentence shall be executed by electrocution pursuant to s. 922.10. *If electrocution is held to be unconstitutional* by the Florida Supreme Court under the State Constitution, or held to be unconstitutional by the United States Supreme Court under the United States Constitution, or if the United States Supreme Court declines to review any judgment holding electrocution to be unconstitutional under the United States Constitution made by the Florida

---

[52] Section 922.10, Florida Statutes (1997), provides as follows:

> 922.10 Execution of death sentence; executioner. – A death sentence shall be executed by electrocution. The warden of the state prison shall designated [sic] the executioner. . . . The warrant authorizing the execution shall be read to the convicted person immediately before execution.

§ 922.10, Fla. Stat. (1997).

Supreme Court or the United States Court of Appeals that has jurisdiction over Florida, *all persons sentenced to death for a capital crime shall be executed by lethal injection.*

(2) The provisions of the opinion and all points of law decided by the United States Supreme Court in *Malloy v. South Carolina*, 237 U.S. 180 (1915), finding that the Ex Post Facto Clause of the United States Constitution is not violated by a legislatively enacted change in the method of execution for a sentence of death validly imposed for previously committed capital murders, are adopted by the Legislature as the law of this state.

(3) A change in the method of execution does not increase the punishment or modify the penalty of death for capital murder. Any legislative change to the method of execution for the crime of capital murder does not violate s. 10, Art. I or s. 9, Art X of the State Constitution.

. . . .

(6) Notwithstanding s. 775.082(2), s. 775.15(1)(a), or s. 790.161(4), or any other provision to the contrary, no sentence of death shall be reduced as a result of a determination that a method of execution is declared unconstitutional under the State Constitution or the Constitution of the United States. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.

§ 922.105, Fla. Stat. (Supp.1998) (emphasis added).

The question posed in the present case is whether retroactive application of these statutory changes violates ex post facto principles. I conclude that it does not, based on *Malloy v. South Carolina*, 237 U.S. 180 (1915). There, South Carolina sought to apply its newly enacted method of execution, electrocution, to a defendant whose crime had been committed before the effective date of the new statute. The statute in effect at the time of the crime had called for death by hanging. The United States Supreme Court held that retroactive application of the more humane method of execution did not violate ex post facto concerns. I would apply Malloy to the present case and allow Provenzano's sentence to be carried out by lethal injection.[53]

---

[53] I would recede from *Washington v. Dowling*, 109 So. 588 (Fla. 1926), to the extent that it is inconsistent with this conclusion. There, the statute that was in effect at the time of the crime called for death by hanging, and the sentence imposed by the trial court specified death by hanging. Before Washington was executed, however, the Legislature enacted a law abolishing hanging and calling for death by electrocution. The Governor issued a warrant ordering that Washington be electrocuted. The trial court ruled the warrant void because it differed from the sentence imposed by the court. The Governor then issued a new warrant ordering death by hanging. Washington petitioned the trial court, claiming that he could not be hung because the new law had abolished hanging. The trial court rejected the claim. This Court affirmed. The Court reasoned that (1) the trial court's sentence calling for death by hanging was final and could not be changed, and (2) the portion of the new law abolishing hanging could not operate to allow Washington to evade the court-ordered punishment. The Court relied on the Savings Clause of article 3, section 32, Florida Constitution (1885), which provided that "the repeal or amendment of any criminal statute shall not affect the

VIII. CONCLUSION

Execution by electrocution – with its attendant smoke and flames and blood and screams – is a spectacle whose time has passed. The fiery deaths of Jesse Tafero and Pedro Medina and the recent bloody execution of Allen Lee Davis are acts more befitting a violent murderer than a civilized state. The color photos of Davis depict a man who – for all appearances – was brutally tortured to death by the citizens of Florida. Violence begets violence, and each of these deaths was a barbaric spectacle played by the State of Florida on the world stage. Each botched execution cast the entire criminal justice system of this state – including the courts – in ignominy.

The United States Constitution stands before the world not as a dark testament to wanton, state-sponsored violence and mutilation, but rather – in the spirit of the founding fathers – as an enduring beacon of light and hope and justice. The United States Supreme Court has ruled that a principal purpose of the Cruel and Unusual Punishments Clause is

> to protect the dignity of society itself from the barbarity of exacting mindless vengeance.

Ford v. Wainwright, 477 U.S. 399, 410 (1986). Our Constitution – this nation's sacred charter – abides as a paragon of

---

prosecution or punishment of any crime committed before such repeal or amendment." I would recede from that portion of *Washington* wherein the Court held that the sentence could not be carried out by electrocution. The Savings Clause thus would be inapplicable. *See, e.g., State v. Watts*, 558 So.2d 994 (Fla.1990) (explaining that the purpose of the Savings Clause is prevent a defendant from *evading* punishment).

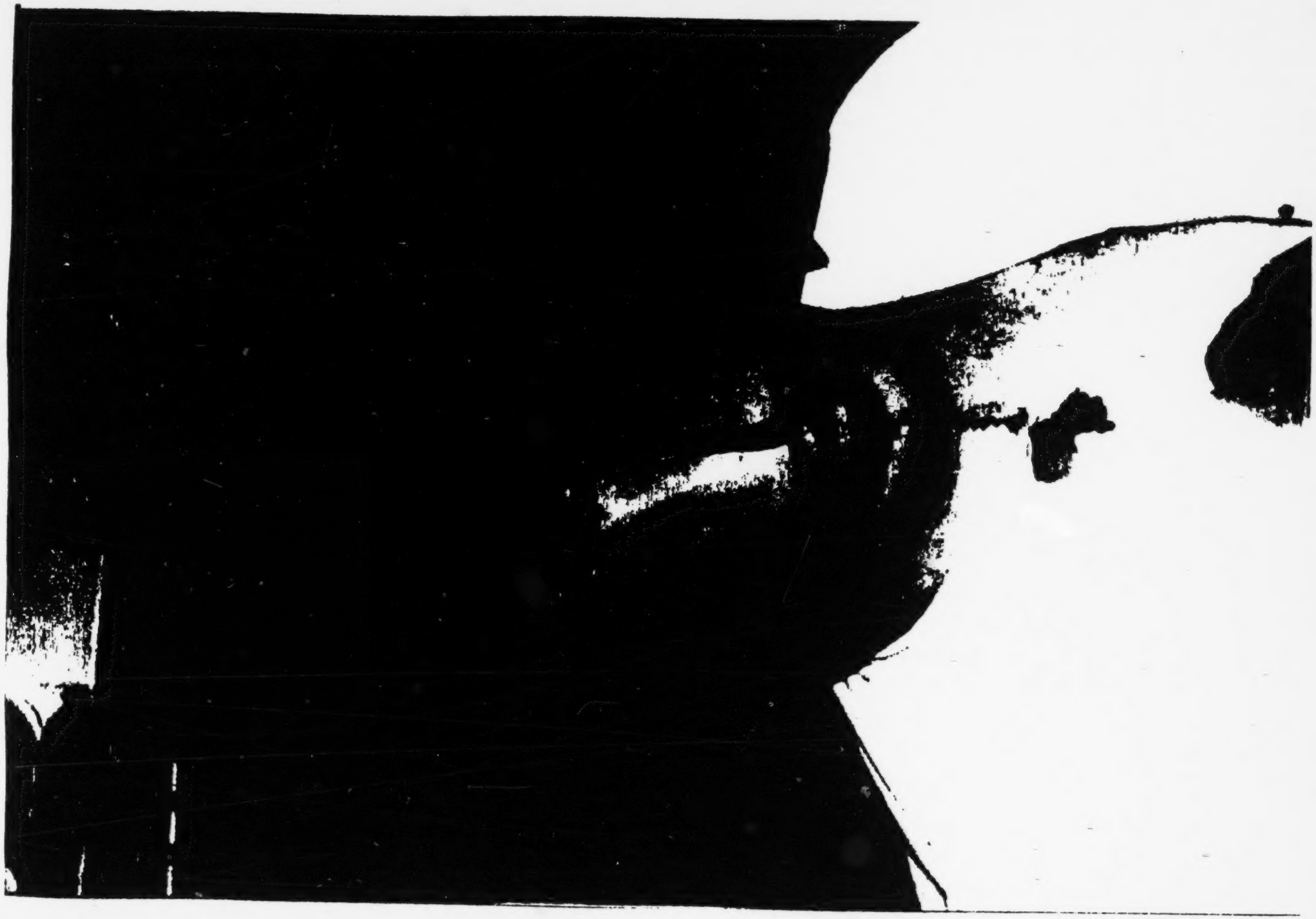
all that is good and decent in the law, a shining example for the world to follow.

Only three other states in the union – Alabama, Georgia and Nebraska – continue to follow Florida's lead in requiring electrocution as the sole means of execution. Scores of states have abandoned this practice. *No other country in the world uses electrocution as a means of execution.* The State's own preeminent experts in this field – i.e., DOC's advisory committee – have recommended that Florida forsake this outdated practice in favor of lethal injection. There comes a time when the Constitution must say "enough is enough."

I would direct that the sentence in the present case be carried out by lethal injection as prescribed by statute.

ANSTEAD, J., concurs.

(POST-EXECUTION PHOTOS OF ALLEN LEE DAVIS WILL BE APPENDED TO THIS DISSENTING OPINION OF SHAW, J.)



ANSTEAD, J., dissenting.

I concur in the scholarly opinions of Justice Shaw and Justice Pariente. I also commend the opinion of Chief Justice Harding which, while contrary to my own on the constitutional issues in question, makes out a compelling case for abandoning electrocution as a method of enforcing the death penalty.

The views of the Chief Justice, Justice Shaw, and Justice Pariente are deeply rooted in the jurisprudence of the U.S. Supreme Court and of this Court. Perhaps no jurist has more eloquently made the same point than our own Justice Ervin in his dissenting opinion in this Court's landmark case of *State v. Dixon*:

> The nation's highest court recognizes we have come a long way from the rack, the "drawing and quartering," the headsman's axe, the public executions, the "hanging judge" – from cruel and unusual punishments. We can little afford to turn back because it is clear to thinking people that brutality and cruelty at the hands of government soils the fabric of an enlightened nation. Governments are constantly under scrutiny – constantly gauged by a nation's thinking people in terms of whether they are enlightened and humane; of whether they are still instruments of oppression, perpetuators of archaic punishments to allay the fears and passions of privileged groups.

State v. Dixon, 283 So.2d 1, 23 (Fla.1973) (Ervin, J., dissenting). Justice Ervin's words seem perfectly suited to today's debate on whether the continuing use of the electric chair constitutes cruel or unusual punishment. His words also strike a chilling chord today because we

are presented with a record and graphic evidence, including photographs, of the horror of Florida's most recent use of the electric chair.

CRUEL OR UNUSUAL

An obvious failing of the majority opinion is its apparent unwillingness to directly confront and explain the Florida Constitution's prohibition of cruel or unusual punishments and the ban of cruel and unusual punishments in the U.S. Constitution.[54] If the majority did so it would surely have to conclude that at the very least punishing someone by the direct application of lethal doses of electricity to various parts of the body is a highly unusual method of punishment, whether considered

---

[54] The resolution of these issues should also serve as an apt reminder that the responsibility of our courts does not end with the mere mechanical processing of cases. We must directly confront the important and sensitive issues that are presented to us. And, of course, there is no greater responsibility assigned to us than to see that the criminal justice process is carried out in accord with the provisions of the Florida and United States Constitutions. It is the exercise of that responsibility that is made visible in the various opinions of the justices of this Court in this case, and it is the diligent exercise of that responsibility that defines the very essence of the role of this Court in the scheme of Florida's constitutional government. We cannot shirk that responsibility because it arises in the context of outrageous criminal conduct involving totally blameless victims. While those extreme circumstances form the backdrop for the issues we confront and may give rise to the most passionate of emotional reactions, it is peculiarly and importantly within the charge of the justice system to be certain that we resolve these important issues without resort to the distorting influences of passion and emotion.

years ago when our constitutions were approved, or considered today. In fact, the United States Supreme Court has quoted with approval an opinion of the New York Court of Appeals characterizing electrocution as "certainly unusual". *In re Kemmler*, 136 U.S. 436, 443-44 (1890). Electrocution is simply not a "usual" form of punishment, and it cannot somehow be made "usual" by its continued use. If we were to allow an "unusual" punishment to become "usual" simply by its repeated usage then we simply would be editing out the ban on unusual punishments in the Florida Constitution.

Determining whether electrocution is a cruel punishment requires more analysis. Arguably, for example, electrocution may not have been considered cruel when it was first introduced in the nineteenth century, because it was then compared to death by hanging and considered more humane than hanging. In fact, the U.S. Supreme Court expressly relied upon findings that electrocution would be more humane than hanging in refusing to interfere with New York's decision to abandon hanging (as a barbaric practice from the dark ages) in favor of the more humane electrocution. *In re Kemmler*. Based on the prevailing culture and knowledge at the time, and the urgency to do away with hanging, it is easy to understand why electrocution may not have been considered constitutionally cruel. However, just as electrocution may have been originally evaluated in comparison with hanging, we know today that the overwhelming majority of death penalty jurisdictions have long since rejected use of the electric chair and have turned to lethal injection as a more humane punishment.

As noted above, *In re Kemmler* was decided in the context of a state's attempt to find a more humane means of death than hanging. However, it is also important to note that the case was decided before electrocution had actually been used. Because we know that lethal injection provides a more humane alternative, and, because we now know from actual experience that electrocution always involves mutilation (within and without the body) and a substantial risk of malfunction (including external burning, bleeding, asphyxiation, etc.), as well as a culture of cruelty ("burn 'em", "fry 'em"), it is apparent that electrocution has become a cruel and senseless punishment, especially when evaluated in light of our evolving standards of decency. Hopefully, just as those who reflected back on the history of hanging at the close of the nineteenth century and concluded it was inhumane, we now, at the close of the twentieth century, have an even more informed and enlightened view of acceptable punishments upon which to evaluate death by electrocution.

In Justice Shaw's opinion he again notes that for humane reasons we as a society have rejected the use of electrocution even for the killing of animals. That simple but eloquent observation perhaps speaks more directly to the heart of the issue before us than any other argument. In effect, we have found the killing of animals by electrocution to be inhumane and uncivilized. We know, as the State has candidly conceded, that the entire process of death by electrocution is at least "somewhat ghastly". We also know, as aptly explained by Chief Justice Harding, that a more humane means of taking life is readily available to the State. Under those circumstances, our continuing embrace of a savage and inhumane means of taking

life does a disservice to our justice system and our society.[55]

SHAW, J., concurs.

PARIENTE, J., dissenting.

I write to explain the reasons I am compelled to dissent in this case. The subject of the debate presented by this case is not whether the death penalty is a constitutionally permissible punishment for those in this State who commit the most aggravated and least mitigated crimes, such as Allen Lee Davis and Thomas Provenzano. Thus, this case does not have to do with the legislative

---

[55] Indeed, it cannot be gainsaid that our justice system is not simply an instrument of vengeance, despite the connotations to that effect contained in the extreme rhetoric that sometimes surrounds the constitutional debate over the continuing use of the electric chair. Unfortunately, the constitutional debate over whether killing a condemned murderer by electrocution constitutes cruel or unusual punishment is recklessly cast by some in terms of a failure of society and the justice system to consider the fate of the innocent victims of the condemned defendant's crimes. That suggestion misperceives the essential role of the justice system, distorts the constitutional debate, and factually misses the mark. Of course, in addition, nothing could be further from reality. The reality is that our society so values human life that we reserve our harshest criminal penalties for violent acts that threaten or take an innocent human life. So, it can hardly be said that the taking of an innocent life is ignored by society or its justice system. But it must never be said that the American justice system has refused to properly confront the issues that it has been given the unique responsibility to decide or, worse yet, that the justice system has allowed itself to become a means for extracting vengeance. We have too often seen the failure of societies whose court systems operate in such ways.

prerogative to specify the punishment for the crime – whether it be death, life in prison, or a sentence of a definite number of years in prison.

Rather, the subject of the legal debate before this Court solely concerns the scope of the legislative prerogative to select one method of execution over another. Thus, the issue in this case is not *whether* Provenzano should be executed; only *how* he should be executed.[56] It is without question that the legislative prerogative to choose a given *method of execution* must be judged by the prohibition against the infliction of cruel and unusual punishment found in the Florida and federal constitutions. *See* U.S. Const., amend. VIII; art. I, § 17, Fla. Const.

As the United States Supreme Court stated in *Wilkerson v. Utah*, 99 U.S. 130, 133 (1878), although the legislative branch may define crimes and "prescribe the punishment of the offenders," this power is "*subject to the prohibition of the Constitution that cruel and unusual punishments shall not be inflicted.*" (Emphasis supplied.) Almost one hundred years later, this principle was reiterated: "It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively

---

[56] Last year when I joined the Court, I joined with Chief Justice Harding in urging the Legislature to switch to lethal injection. However, our Legislature, while providing for lethal injection *if* electrocution is declared unconstitutional, has elected to retain electrocution as its sole method of execution. This leaves the Court with no choice but to fulfill our obligation to examine the constitutional question.

approved or not." *Gregg v. Georgia*, 428 U.S. 153, 174 (1976) (quoting *Furman v. Georgia*, 408 U.S. 238, 313-14 (1972) (White, J., concurring)).[57]

"[T]he Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability" of a challenged punishment, guided by "objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592, 597 (1977) (plurality opinion). Thus, the Court must exercise its own judgment as to whether a method of execution is cruel and unusual in order to enforce the requirement of the

---

[57] *See also Furman v. Georgia*, 408 U.S. 238, 263-68 (1972) (per curiam) (Brennan, J., concurring) (citations omitted):

> [The Framers] included in the Bill of Rights a prohibition upon "cruel and unusual punishments" precisely because the legislature would otherwise have had unfettered power to prescribe punishments for crimes. . . .
>
> . . . Accordingly, the responsibility lies with the courts to make certain that the prohibition of the Clause is enforced. . . .
>
> . . . The right to be free from of cruel and unusual punishments, like the other guarantees of the Bill of Rights, "may not be submitted to vote; (it) depend(s) on the outcome of no elections." "The very purpose of a Bill of Rights was to withdraw certain subjects from vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."
>
> Judicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes.

Eighth Amendment that cruel and unusual punishment not be inflicted.

To determine whether electrocution constitutes cruel and unusual punishment, we must first consider what the United States Supreme Court has considered to be the purpose and scope of the Eighth Amendment's prohibition against cruel and unusual punishment. As explained in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), the Eighth Amendment must draw its "meaning from the evolving standards of decency that mark the progress of a maturing society."

Perhaps the most concise discussion of the scope of the Eighth Amendment is set forth in *Estelle v. Gamble*, 429 U.S. 97 (1976):

> It suffices to note that the primary concern of the drafters [of the Eighth Amendment] was to proscribe *"torture(s)" and other "barbar(ous)" methods of punishment.* Accordingly, this Court first applied the Eighth Amendment by comparing challenged methods of execution to concededly inhuman techniques of punishment. . . .
>
> Our more recent cases, however, have held that the Amendment *proscribes more than physically barbarous punishments.* The Amendment embodies "broad and idealistic concepts of *dignity, civilized standards, humanity, and decency* . . . ," against which we must evaluate penal measures. Thus, *we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society" or which "involve the unnecessary and wanton infliction of pain."*

Id. at 102 (citations omitted) (emphasis supplied). This clause has an "expansive and vital character." *Glass v. Louisiana*, 471 U.S. 1080, 1083 (1985) (Brennan, J., dissenting from denial of certiorari) (quoting *Weems v. United States*, 217 U.S. 349, 377 (1910)). "[T]he Amendment has been interpreted in a flexible and dynamic manner." *Gregg*, 428 U.S. at 171. As concepts of civility and dignity evolve, so do the limits of what constitutes cruel and unusual punishment. *See Dulles*, 356 U.S. at 100. Accordingly, Eighth Amendment issues must be evaluated "in light of contemporary human knowledge," *Robinson v. California*, 370 U.S. 660, 666 (1962), rather than "in reliance on century-old factual premises that may no longer be accurate." *Glass*, 471 U.S. at 1083 (Brennan, J., dissenting from denial of certiorari). These broad statements of constitutional principles apply with equal force to determine the legality of a method of execution. *See Campbell v. Wood*, 511 U.S. 1119, 1121 (1994) (Blackmun, J., dissenting from denial of certiorari) (explaining that the United States Supreme Court has never "distinguished between challenges to the proportionality and method of capital punishment").

In holding that the absence of conscious pain after the electrical current is administered ends the judicial inquiry into whether electrocution is unconstitutional, the majority decision in this case relies on our opinion in *Jones v. State*, 701 So.2d 76, 79 (Fla.1997), *cert. denied*, 118 S.Ct. 1297 (1998). *Jones* in turn cites to *Gregg v. Georgia*, 428 U.S. 153 (1976), *Louisiana ex. rel Francis v. Resweber*, 329 U.S. 459 (1947), and *Campbell v. Wood*, 18 F.3d 662 (9th Cir.1994). However, no such narrow and conclusive statement can be derived from those cases.

The fact that the method of execution may result in instantaneous death, while an important factor to consider, does not end the judicial inquiry into whether the method of punishment is cruel and unusual. Analyzing the constitutionality of punishment under the Eighth Amendment, the Supreme Court in *Gregg* also stated that a "penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' " 428 U.S. at 173 (quoting *Dulles*, 356 U.S. at 100).

Further, the Campbell decision relied on the following statement in *Glass*:

> What are the objective factors by which courts should evaluate the constitutionality of a challenged method of punishment? First and foremost, the Eighth Amendment prohibits "the unnecessary and wanton infliction of pain." *Gregg v. Georgia, supra*, at 173 (opinion of Stewart, Powell, and Stevens, JJ.). *See also Coker v. Georgia, supra*, at 592, (plurality opinion) (a punishment is excessive if it is "nothing more than the purposeless and needless imposition of pain and suffering"); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence"). *The Court has never accepted the proposition that notions of deterrence or retribution might legitimately be served through the infliction of pain beyond that which is minimally necessary to terminate an individual's life.*

Glass, 471 U.S. at 1084 (Brennan, J., dissenting from denial of certiorari) (emphasis supplied), *cited in Campbell*, 18

F.3d at 682. However, *Campbell* failed to cite to the remainder of Justice Brennan's explanation in *Glass* that the contours of the Eighth Amendment extend beyond whether there is conscious pain inherent in the method of execution:

> The Eighth Amendment's protection of "the dignity of man," *Trop v. Dulles, supra,* at 100, (plurality opinion), extends beyond prohibiting the unnecessary infliction of pain when extinguishing life. *Civilized standards, for example, require a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. See, e.g.,* Royal Commission on Capital Punishment, 1949-1953 Report ¶ 732, p. 255 (1953) (hereinafter Royal Commission Report). Similarly, basic notions of human dignity command that the State minimize "mutilation" and "distortion" of the condemned prisoner's body. *Ibid.* These principles explain the Eighth Amendment's prohibition of such barbaric practices as drawing and quartering. *See, e.g., Wilkerson v. Utah, supra,* at 135.

Glass, 471 U.S. at 1085 (Brennan, J., dissenting from denial of certiorari). Thus, the Eighth Amendment also requires that the method of execution minimize physical violence as well as mutilation and distortion of the human body.

Therefore, my conclusion differs from the majority because I fail to see how United States Supreme Court precedent allows us to limit our constitutional inquiry to the presence or absence of conscious pain. Even the concurring opinion of Justice Quince recognizes that the "real question" is whether electrocution violates the "evolving standards of decency." Concurring opinion of

Quince, J., at 17. In apparent recognition that the constitutional inquiry is not so limited, the State conceded in oral argument that the guillotine would not pass constitutional muster today, even though it most likely results in an instantaneous death without the defendant suffering conscious pain.

No one seriously disagrees that as of the end of the twentieth century, lethal injection is a more humane method of execution and creates far less a spectacle than electrocution. It is less physically violent and minimizes mutilation of the body. No one seriously disagrees that electrocution was originally selected by the State of New York in 1885 in lieu of hanging because *at that time* the executive and legislative branches affirmatively determined that electrocution was the "most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." *In re Kemmler*, 136 U.S. 436, 444 (1890). There is no indication that the legislative decision in 1999 to retain electrocution, contrary to the recommendations of the Florida Corrections Commission, was based on objective evidence that this method was more humane than lethal injection or other alternative methods.[58]

The Legislature does not have the prerogative to select a method of execution that is inherently cruel,

---

[58] In fact, it appears the prime concern of the Legislature was that the death sentences not be invalidated as a result of a change in the method of execution. As Justice Harding's concurring opinion and Justice Shaw's dissent explain, the change to lethal injection would not result in any death sentence being vacated.

violent and mutilating when more humane methods exist. The State's only legitimate interest is in the extinguishment of life. Indeed, the State has not made the argument in this case that the Legislature has the "right" to make the execution more violent and more cruel than necessary to extinguish the lives of those sentenced to death.

In determining whether electrocution comports with "evolving standards of decency," we should consider the fact the Florida Corrections Commission recommended that the electric chair be phased out as a method of execution in favor of lethal injection because it "believes that Florida has an obligation to ensure that modern technologies keep pace with the level of competence in this area, and, just as changes have occurred in Florida's past in carrying out the death penalty, changes should again occur." *Jones*, 701 So.2d at 82 (Kogan, C.J., dissenting) (quoting Florida Corrections Comm'n, *Supplemental Report on Execution Methods Used by States* (1997)).

We cannot ignore the objective evidence that almost every state that authorizes the death penalty has either selected or changed its method to lethal injection – some in response to the botched executions of Medina and Tafero. While the fact that only three other states (Georgia, Alabama, and Nebraska[59]) retain electrocution as the sole method of execution is not determinative of the constitutional question, this fact bears on the exercise of

---

[59] In Nebraska, legislation has been proposed that would change the method of execution from electrocution to lethal injection. *See* LB 52, 96th Leg., 1st Spec. Sess. (Neb.1999).

the Court's judgment as to whether the method of punishment violates contemporary standards of decency. *See Gregg*, 428 U.S. at 172-76.

In addition, we must look at the actual experience in recent years with the electric chair. Recent executions have revealed one problem after another.[60] Flames spewed from the heads of Medina and Tafero. *See Jones*, 702 So.2d at 85-86. The cause was found to be an improper sponge. *See id.* at 86. After two flaming executions, the sponges were replaced and the flames ceased. However, it is undisputed that despite all of the best efforts, electrocution will result in burning of parts of the body. In fact, all of the inmates in the last executions have sustained outward burns to their bodies. Thus, burning is inherent in the method of the execution.

It is undisputed that, despite all best efforts, inmates have been observed breathing after the electric current has ceased. This indicates that brain stem activity has continued even after the application of electrical current. Now with the last execution, there is a serious question as to whether the mouth piece partially asphyxiated Davis, which resulted in bloody side show – a spectacle more

---

[60] I agree that the Department of Corrections (DOC) appears to be attempting in good faith to correct recurrent problems that have turned a series of executions over the last few years into something of a freak show. In fact, it is precisely because these problems continue to occur, despite the best efforts of DOC, that the electric chair is not only unconstitutional as applied in Florida, but per se unconstitutional as a cruel and unusual punishment incompatible with evolving standards of decency.

befitting of a "B" Hollywood horror movie than a state-sanctioned execution.

Although a factual finding has been made by two different circuit court judges that Florida's electric chair causes no conscious pain, these factual findings need only be made by a preponderance of the evidence. Despite our deferential standard of review to trial court's factual findings, the expert testimony submitted by Provenzano and the witness accounts of survival after electrocution raise serious questions that judicial electrocution does in fact involve conscious pain and suffering. *See generally Glass*, 471 U.S. at 1086-87 (Brennan, J., dissenting from denial of certiorari) ("There is considerable empirical evidence and eyewitness testimony . . . [that] suggests that death by electrical current is extremely violent and inflicts pain and indignities far beyond the 'mere extinguishment of life.' "). We cannot simply ignore this evidence.

As Justice Brennan observed, "[I]t is firmly within the 'historic process of constitutional adjudication' for courts to consider, *through a 'discriminating evaluation' of all available evidence, whether a particular means of carrying out the death penalty is 'barbaric' and unnecessary in light of currently available alternatives.*" *Id.* at 1084 (quoting *Furman*, 408 U.S. at 420 (Powell, J., dissenting)) (emphasis supplied).[61] All of this leads to the conclusion that this method of execution does not comport with "evolving

---

[61] Justice Powell's views in *Furman v. Georgia*, 408 U.S. 238 (1976), were largely adopted by the Supreme Court as the analysis to be used in Eighth Amendment claims in *Gregg v. Georgia*, 428 U.S. 153 (1976).

standards of decency," *Trop*, 356 U.S. at 101, based on an evaluation of "objective factors." *Coker*, 433 U.S. at 592.

"The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Resweber*, 329 U.S. at 464 (emphasis supplied). Certainly, knowledge of death involves fear, which is inevitable with all impending executions. However, all of the other troubling aspects of recent electrocutions – the flames, the blood, the screams, the burning, and the resulting spectacle of the actual execution – indicate to me that there is cruelty, violence and mutilation inherent in this method of execution.

In enacting the Eighth Amendment, the founders of this Nation determined that, as a civilized nation, we would not allow the State to become the instrument of cruelty and violence in the methods chosen to punish those who violated the law. This enduring constitutional principle applies no matter how great our desire as individuals for vengeance and no matter how cruel, how ghastly, or how violently the innocent victims died.

We do not have to wait another fifty years to determine that in 1999, electrocution is not only unusual, since only three states including Florida currently execute its death-sentenced offenders solely by electrocution, but it is also inherently cruel as involving mutilation and violence. Electrocution, as a method of carrying out the State's legitimate interest in imposing the ultimate penalty of death, has become incompatible with the concepts of "dignity, civilized standards, humanity, and decency"

that embody the essence of the Eighth Amendment. *Estelle*, 429 U.S. at 102. History and this Court's recent experience with the electric chair all point to this inevitable conclusion. Just as the guillotine, public hanging and death by firing squad would be deemed barbaric relics of another era, so must electrocution be declared unconstitutional as violative of the Eighth Amendment's clear prohibition that cruel and unusual punishment not be inflicted.

ANSTEAD, J., concurs.

NO MOTION FOR REHEARING WILL BE ALLOWED.

Original Proceeding – Habeas Corpus

Michael P. Reiter, Chief Assistant CCRC, and Mark S. Gruber, Assistant CCRC, Capital Collateral Regional Counsel – Middle Region, Tampa, Florida; and Martin J. McClain, Special Assistant CCRC, Brooklyn, New York,

for Petitioner

Robert A. Butterworth, Attorney General, Richard B. Martell, Chief, Capital Appeals, and Carolyn M. Snurkowski, Assistant Deputy Attorney General, Tallahassee, Florida, Katherin V. Blanco and Carol M. Dittmar, Assistant Attorneys General, Tampa, Florida; and Louis A. Vargas, General Counsel and Susan A. Maher, Deputy General Counsel, Department of Corrections, Tallahassee, Florida,

for Respondent

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

[637] TURNED OFF.

RECOGNIZING THERE ARE NOT CONTROLLED EXPERIMENTS IN HUMAN EXECUTION WITH ELECTRICITY, ONE USES THESE ANIMAL MODELS TO INTERPRET WHAT'S GOING ON.

AND THE TURNING OFF OF THE RESPIRATOR FOR A PARALYZED ANIMAL IS EQUIVALENT TO TURNING ON VOLTAGES THAT ARE SUFFICIENTLY HIGH THAT THE INTERCOSTAL PECTORAL DIAPHRAGMATIC AND ABDOMINAL MUSCLES CANNOT CONTRACT SO THE PERSON CANNOT BREATHE. SO THE FIRST ACTION ON THE MACROSCOPIC PHYSIOLOGY IS THAT OF BEING ASPHYXIATED.

NOW, IF YOU WANT TO GO BEYOND THAT, PEOPLE SURVIVE THAT PROCESS BECAUSE THERE ARE CASES OF HUNDREDS OF PEOPLE WHO HAVE SURVIVED HIGH-VOLTAGE INJURY.

WHAT IS VASTLY MORE COMPELLING IN MY MIND IS THE SUBSET OF THESE PATIENTS – THESE ARE PATIENTS BECAUSE THEY'RE CASE STUDIES, WHO REPORT OR WERE REPORTED TO MAINTAIN CONSCIOUSNESS THROUGH THE EPISODE. THROUGH THE ACCIDENT.

BY MR. THOMAS:

Q DO YOU HAVE A CASE STUDY THERE, DOCTOR, THAT WOULD BE ILLUSTRATIVE OF HIGH-

VOLTAGE ELECTRICAL INJURY TO THE HEAD OF AN INDIVIDUAL?

[638] **A** OKAY. I THINK IT WOULD BE – THE COURT'S FORBEARANCE, IT WOULD BE WORTH READING SEVERAL SENTENCES FROM EACH OF ABOUT 10 ARTICLES THAT DESCRIBE WHAT'S GOING ON. CASE ONE. I CAN GIVE YOU – DO YOU WANT THE CITATIONS?

THE COURT: WELL, I THINK IT'S GOT TO BE IN THE RECORD WHAT YOU'RE READING.

MR. THOMAS: YOUR HONOR, THE QUESTION IS – I AM INTENDING TO OFFER SUBSTITUTE COPIES OF THESE DOCUMENTS BECAUSE THESE ARE DR. WIKSWO'S ONLY PERSONAL COPIES.

THE COURT: THEY'RE SOMEBODY ELSE'S ARTICLES? THEN IT OUGHT TO BE STATED WHERE THEY'RE FROM.

THE WITNESS: ARTICLE ENTITLED –

MR. NUNNELLEY: YOUR HONOR, I OBVIOUSLY HAVE NOT BEEN PROVIDED A COPY OF THIS. IF A COPY CAN BE PROVIDED TO ME SO I CAN READ IT IN PREPARATION FOR CROSS-EXAMINATION, WHICH WOULD BE APPRECIATED.

MR. THOMAS: I CAN DO THAT DURING OUR BREAK.

THE COURT: LOOK OVER HIS SHOULDER IF YOU WANT TO.

THE WITNESS: HELP YOURSELF.

MR. NUNNELLEY: OKAY.

[639] **THE WITNESS:** BRING A CHAIR.

MR. NUNNELLEY: PLAN ON BEING THAT LONG, DOCTOR?

THE WITNESS: MAYBE.

MR. NUNNELLEY: GOT ALL NIGHT.

(WITNESS READING:)

THE WITNESS: JOURNAL OF TRAUMA, 1975, SPINAL CORD INJURY FOLLOWING ACCIDENTS CASE REPORTS. FIRST AUTHOR, NORMAN S. LEVINE. CASE ONE.

THE FIRST PATIENT WAS A 35-YEAR-OLD FARMER WHO, WHILE RIDING ON A GRAVEL BIN, STRUCK HIS HEAD AGAINST A HIGH-VOLTAGE POWER LINE. FIGURE ONE. HE DENIED LOSS OF CONSCIOUSNESS. PHYSICAL EXAMINATION REVEALED 10 PERCENT BODY AREA – BODY SURFACE AREA BURNS INVOLVING THE RIGHT FACE, NECK, RIGHT SHOULDER AND RIGHT KNEE.

AND THIS IS THE PHOTOGRAPH OF THE BURNS OF THE PATIENT WHO SURVIVED CONTACT WITH THE HIGH-VOLTAGE POWER LINE.

SECOND, A –

MR. NUNNELLEY: YOUR HONOR, IF I COULD ASK THE WITNESS TO SEPARATE THE ONES THAT HE READS OUT SO THAT I CAN RETURN TO THEM FOR CROSS-EXAMINATION.

[640] **THE COURT:** PLEASE DO.

THE WITNESS: I'M DOING THAT. THANK YOU. THE JOURNAL IS S.A. MEDISE TYDKKRIF, M-E-D-I-S-E-T-Y-D-K-K-R-I-F, FROM 27 FEBRUARY, 1982. I BELIEVE IT'S A SOUTH AFRICAN ARTICLE. HIGH-VOLTAGE ELECTRICAL INJURY ACCIDENT, A CASE REPORT AND REVIEW OF THE LITERATURE.

A WELL-BUILT OVAMBO, O-V-A-M-B-O, WORKER WEIGHING 100-KILOGRAMS SUFFERED AN 11,000-VOLT ELECTRICAL INJURY WHEN HE ACCIDENTALLY CLASPED TWO GUIDE-WIRES SUSPENDED FROM WOODEN POLES CARRYING HIGH-TENSION CABLES.

ON ADMISSION TO THE HOSPITAL LESS THAN ONE HOUR AFTER INJURY, THE PATIENT WAS SLIGHTLY CONFUSED BUT DENIED ANY LOSS OF CONSCIOUSNESS.

THE THIRD ARTICLE IS IN THE JANUARY 13TH, 1934 LANCET. ENTITLED "NEUROLOGICAL EFFECTS OF LIGHTENING [sic] AND OF ELECTRICITY." BY MCDONALD CRITCHLEY, C-R-I-T-C-H-L-E-Y. AND TWO OTHER AUTHORS.

NOW, THIS IS AN EXAMPLE. THERE ARE TWO EXAMPLES IN HERE. THE FIRST TYPE IS DELAYED DEATH. MALE, AGED 42 YEARS: DEATH FROM BURNS AND EXHAUSTION FOUR HOURS AFTER A SHOCK OF 66,000 VOLTS.

[641] MALE, AGED 18: DEATH FROM PNEUMONIA AND TOXEMIA FROM BURNS 17 DAYS AFTER A SHOCK FROM 132,000 VOLTS.

MALE, AGED 35 YEARS: DEATH FROM BURNS AND TOXEMIA EIGHT DAYS AFTER A SHOCK FROM 19,000 VOLTS.

THERE IS NO STATEMENT OF CONSCIOUSNESS ON THESE, BUT THIS ARTICLE IS INTERESTING IN THAT IT STATES THAT DEATH WAS NOT INSTANTANEOUS AT THOSE SHOCKS.

THERE ARE TWO COMMENTS – THERE ARE TWO COMMENTARIES. ONE IS AT LOW VOLTAGE, WHICH I WON'T READ.

THERE IS ANOTHER COMMENTARY: A BOY, AGED 12, CLIMBED A 30-FOOT PYLON CARRYING A HIGH-TENSION WIRE AT A PRESSURE OF 11,000 VOLTS AC. AT THE TOP, HE TOUCHED THE WIRE WITH HIS ARM, RECEIVED A SHOCK AND FELL TO THE GROUND. THE VILLAGE WAS PLUNGED INTO DARKNESS AND THE RADIOS CUT OFF, BUT THE BOY HIMSELF SEEMED LITTLE THE WORSE. HE PICKED HIMSELF UP AND WALKED HOME A DISTANCE OF A QUARTER OF A MILE. HIS PARENTS NOTICED HE WAS A LITTLE PALE AND SUBDUED. THEY DID NOT SUSPECT ANYTHING UNTIL THE BOY ASKED FOR HIS LUNCH. ACTUALLY, HE HAD HIS LUNCH LONG [642] BEFORE, AND ALSO HIS TEA. NEIGHBORS WHO HAD SEEN HIM FALL FROM THE PYLON NOW ARRIVED ON THE SCENE AND EXPLAINED MATTERS.

THIS IS AN ARTICLE FROM THE JOURNAL OF TRAUMA, 1990. "NEUROLOGICAL CONSEQUENCES OF ELECTRICAL BURNS." FIRST AUTHOR, GRUBE, G-R-U-B-E. LOSS OF CONSCIOUSNESS OCCURRED IN

29 OF THE 64 PATIENTS IN THE HIGH-VOLTAGE GROUP. TABLE THREE.

AND IN THIS CASE, THE HIGH-VOLTAGE GROUP WAS 54 – 54 OF THE 64 PATIENTS IN THE HIGH-VOLTAGE GROUP HAD KNOWN VOLTAGES. THE MEDIAN VOLTAGE WAS 7,200 VOLTS AND RANGED FROM 440 VOLTS TO 150,000 VOLTS. SO MY INTERPRETATION OF THIS ISSUE – OF THE 64 PATIENTS, 35 OF THEM REMAINED CONSCIOUS DURING THE SHOCK.

AN ARTICLE FROM CRITICAL CARE MEDICINE, 1990, CLINICAL PREDICTORS OF MYOCARDIAL DAMAGE AFTER HIGH-VOLTAGE ELECTRICAL INJURY. FIRST AUTHOR, CHANDRA, C-H-A-N-D-R-A.

THEY EVALUATED 34 PATIENTS WITH HIGH-VOLTAGE ELECTRICAL INJURIES ADMITTED BETWEEN FEBRUARY 1982 AND OCTOBER OF 1984. THEY DIVIDED THE PATIENTS INTO TWO GROUPS. GROUP A WAS EXPOSED TO BETWEEN 3,000 AND 130,000 VOLTS. NINE DID NOT [643] LOSE CONSCIOUSNESS, FOUR DID. GROUP B WAS 440 VOLTS TO 7,000 VOLTS. SIX LOST – CORRECTION, SIX DID NOT LOSE CONSCIOUSNESS AND FIVE DID.

ANOTHER ARTICLE. FROM THE "ANNALS OF EMERGENCY MEDICINE." MYOCARDIAL INFARCTION FOLLOWING ELECTRICAL INJURY. 1982. K-I-N-N-E-Y, KINNEY, FIRST AUTHOR.

A 57-YEAR-OLD MAN WAS ONE OF SEVERAL WORKERS INJURED AT A CONSTRUCTION SITE. A CRANE BOOM INADVERTENTLY CONTACTED A

HIGH-TENSION LINE RATED AT 23,000 VOLTS. THE RESULTING ELECTRICAL CIRCUITY [sic] ELECTROCUTED THE CRANE OPERATOR.

OUR PATIENT WAS STANDING BEHIND THE CRANE HOLDING A WELDING TORCH THAT MAY HAVE COME INTO DIRECT CONTACT WITH THE CRANE BODY. OBSERVERS REPORTED THAT THE PATIENT WAS THROWN SIX TO EIGHT FEET IN THE AIR. THE PATIENT ADMITTED THAT HE DID FEEL THE ELECTRIC SHOCK AND THE RESULTING MOMENTARY PARALYSIS BUT DID NOT RECALL BEING THROWN TO THE GROUND. HE MAY HAVE LOST CONSCIOUSNESS FOR SEVERAL SECONDS.

THIS IS AN ARTICLE FROM CHAPTER 24 OF – I HAVE TO FIND THE BOOK. BUT IT'S AN ARTICLE ENTITLED "ELECTRICAL TRAUMA" BY FREDERICK PANSE, P-A-N-S-E.

[644] AND HE QUOTES AN ARTICLE WRITTEN BY MCLAUGHLIN IN 1930 WHO IN TURN QUOTED A [sic] WORDS OF A PATIENT WHO STOOD ON A LADDER IN A TRANSFORMER STATION HOLDING ONTO AN IRON WALL BRACKET WITH HIS LEFT HAND WHICH WAS IN A LEATHER GLOVE, AND STRETCHING HIS RIGHT HAND TOWARDS 22,000-VOLT TRIPHASIC AC CONDUCTOR WHICH HE BELIEVED TO BE SWITCHED OFF.

THE VICTIM STATED, "WHEN THE BACK OF MY RIGHT HAND GOT WITHIN ONE-HALF TO THREE-QUARTERS OF AN INCH FROM THE CONDUCTOR, SIX OR SEVEN NARROW BLUE SPARKS SUDDENLY JUMPED TO THE KNUCKLE OF MY RING FINGER.

"AT ONCE, MY HEAD SEEMED TO GET BIGGER AND BURST WITH PAIN. I HEARD THE MOST FRIGHTENING NOISES IN MY HEAD AND EARS, AS IF I HAD BECOME A MIGHTY GENERATOR INSIDE. AT THE SAME TIME, MY BODY, LEGS AND FEET SEEM TO SHRINK DOWN TO NOTHING UNTIL I FELT THAT I COULD HAVE STOOD ON A 10-CENT PIECE.

"SIMULTANEOUSLY I FELT A BURNING SENSATION IN BOTH HANDS. I COULD NOT SAY HOW MANY SECONDS IT LASTED, BUT IT SEEMED TO ME A TERRIBLY LONG TIME. MY SENSES WERE PARTIALLY NUMBED, BUT I REMAINED CONSCIOUS, AND I FELT AS IF I WAS IN THE [645] CLAWS OF A MIGHTY MONSTER. MY EFFORTS TO MOVE MY RIGHT ARM OR HAND AGAINST THIS MAGNETIC POWER WERE QUITE UNAVAILING. EVEN MY EYES SEEMED FIXED AND STARING."

AN ARTICLE FROM THE JUNE 1968 JOURNAL OF NEUROLOGY, TITLED, "DELAYED NEUROLOGICAL SEQUELAE OF ELECTRICAL INJURIES" BY DONALD FARRELL AND ARNOLD STARR.

A 67-YEAR-OLD RIGHT-HANDED MAN WAS INJURED ON JUNE 1ST, 1964 BY 18,000 VOLTS AC, 60 HERTZ, FROM A HIGH-TENSION LINE WHILE AT WORK AS A PIPEFITTER. HE WAS STANDING ON A ROCK GUIDING ONE END OF A METAL PIPE WITH HIS RIGHT HAND WHEN THE OTHER END OF THE FINE [sic] HIT THE HIGH-TENSION LINE.

HE REMEMBERS A LOUD, QUOTE, "BANG," CLOSED QUOTE AND WAS TOLD HE WAS THROWN ABOUT FOUR FEET FROM THE ROCK. HE WAS

DAZED FOR ONLY A FEW SECONDS AND RESUMED WORK IMMEDIATELY EVEN THOUGH HE FELT SHAKY FOR THE REMAINDER OF THE DAY.

THERE'S AN ARTICLE IN THE JOURNAL OF FORENSIC SCIENCES ON ELECTROCUTION, A REVIEW OF 155 CASES WITH EMPHASIS ON HUMAN FACTORS. FIRST AUTHOR MELLEN, M-E-L-L-E-N.

THEY DESCRIBED 165 DEATHS IN THE [646] HIGH-VOLTAGE CATEGORY. EIGHT OF THEM YELLED OUT. SO THEY WERE CONSCIOUS ENOUGH TO YELL OUT AS THEY'RE BEING SHOCKED.

IN AN ARTICLE IN THE IEEE TRANSACTIONS OF EDUCATION FROM 1991 ON MEDICATION ENTITLED "ELECTRICAL SHOCKS" BY THEODORE BERNSTIEN

HE STATES, "SEVERAL ELECTROCUTIONS HAVE TOLD THE AUTHOR OF BEING ON A LADDER WHEN THEY BECAME FROZEN TO THE CIRCUIT. THEY FREED THEMSELVES BY KICKING THE LADDER OUT FROM UNDER THEMSELVES TO ALLOW THEIR BODY WEIGHT TO PULL THEM FREE. THIS IS AN EXAMPLE OF HOW THE MIND IS FUNCTIONING, BUT THE ARM MUSCLES CANNOT BE CONTROLLED VOLUNTARILY. OTHERS HAVE STATED WHEN FROZEN TO THE CIRCUIT, THEY SHOUTED FOR HELP WHILE BYSTANDERS REPORTED. THEY HEARD ONLY A SOUND MORE LIKE A WIMPER."

THE LAST ARTICLE IS "PATTERNS OF HIGH-TENSION ELECTRICAL INJURY IN CHILDREN AND ADOLESCENTS AND THEIR MANAGEMENT." FIRST

AUTHOR IS BURKE, B-U-R-K-E. DISCUSSES 25 JUVENILE PATIENTS WHO WERE EITHER POLE OR TREE-CLAIMING [sic] AND CAME IN CONTACT WITH HIGH-VOLTAGE ELECTRICITY.

STATES, "ALTHOUGH PERMANENT AMNESIA FOR EVENTS SURROUNDING THE INCIDENT WERE RARE, MANY [647] OF THE PATIENTS WERE STUNNED, KNOCKED UNCONSCIOUS OR RETICENT ABOUT THE EVENT."

WHAT'S INTERESTING ABOUT THAT IS IT DOES NOT SAY THAT ALL THE PATIENTS WERE KNOCKED UNCONSCIOUS AND HAD AMNESIA.

MR. NUNNELLEY: OBJECT. MOVE TO STRIKE. THE WITNESS IS EDITORIALIZING. THE ARTICLE SPEAKS FOR ITSELF, AND HE'S READING IT INTO THE RECORD.

THE COURT: OVERRULED.

THE WITNESS: THE REMAINDER OF THE ARTICLES – AND THERE ARE ABOUT 20 MORE – ARE CASES OF – LITERALLY HUNDREDS OF CASES OF SURVIVAL OF HIGH-VOLTAGE INJURY IN SOME CASES, FOR EXAMPLE, BETWEEN THE HEAD AND FOOT – 150,000 VOLTS. YES, THIS ARTICLE. THIS DOES NOT DISCUSS CONSCIOUSNESS, BUT IT'S –

MR. NUNNELLEY: SIR, I DIDN'T KNOW WE WERE GOING BACK TO FURTHER READING OF THE ARTICLES.

THE COURT: LET'S MOVE ON. LET'S MOVE ON.

MR. NUNNELLEY: THANK YOU, YOUR HONOR.

MR. THOMAS: THANK YOU.

BY MR. THOMAS:

Q DR. WIKSWO, BASED ON THOSE STUDIES AND OTHERS LIKE THEM IN YOUR OTHER REVIEW, DO YOU HAVE AN OPINION AS

* * *

Florida Corrections Commission

EXECUTION METHODS
Used by States
Supplemental Report

[LOGO]
June 1997

[LOGO]

Florida Corrections Commission

Members:

[Names And Addresses Omitted In Printing]

June 20, 1997

The Honorable Lawton Chiles
Governor
PL 05
The Capitol
Tallahassee, Florida 32399-0001

The Honorable Toni Jennings
President
The Florida Senate
Suite 405, The Capitol
Tallahassee, Florida 32399

The Honorable Daniel Webster
Speaker
Florida House of Representatives
Suite 424, The Capitol
Tallahassee, Florida 32399

Dear Governor Chiles, President Jennings, and Speaker Webster:

Based upon Florida's recent experiences in the Tafero and Medina executions utilizing the electric chair, the Florida Corrections Commission instructed its staff to conduct an extensive survey of the execution methods used in other

states. The results from that survey and this Commission's recommendations are contained in the Commission's *1997 Supplemental Report on Execution Methods Used by States.*

Surveyed states were asked to describe their execution procedures; composition of the execution team, including any medical personnel; problems encountered during execution; and, any documented costs of execution equipment. If a state had recently changed to lethal injection, they were asked what prompted the change, what method was previously used, and any legal ramifications of the change in methods.

We found that almost all states have written procedures regarding the execution process, and that numerous states had recently changed to lethal injection from electrocution because it was considered to be a "more humane method of execution." While the report notes problems encountered in the past with almost *all* methods of execution, including lethal injection, the Commission recommends that Section 922.10, Florida Statutes, be amended to allow lethal injection as an alternative method of execution, in addition to electrocution, for those persons currently on a sentence of death. Furthermore, for persons whose crimes are committed on or after the effective date of such legislation, lethal injection would be the only method of execution, thereby "phasing out" the use of the electric chair in Florida.

The Florida Corrections Commission believes that Florida has an obligation to ensure that modern technologies keep pace with the level of competence in this area, and,

just as changes have occurred in Florida's past in carrying out the death penalty, changes should again occur.

Respectfully submitted,

/s/ Edgar M. Dunn, Jr.
Edgar M. Dunn, Jr.
Chairman

Florida Corrections Commission

Execution Methods Used by States

Table of Contents

Table of Tables iii

Introduction 1

The Death Penalty in Florida 2

Executions in the U.S. – A Brief History 4

Methods Of Execution By State 7

Survey of States 8

Methodology 8

Highlights of Survey 10

Problems Encountered 10

Details of Survey of States 11

Alabama 11
Arkansas 12
Connecticut 14
Georgia 15
Illinois 16
Indiana 16
Kentucky 17
Louisiana 18
Missouri 18
Nebraska 19
New York 20
Ohio 20
Oklahoma 20
Pennsylvania 21
South Carolina 22
Tennessee 22
Texas 23
Virginia 24
Previous Legislation Proposed by Florida Legislature 25
Florida's Attorney General Recommendation 27
Florida Corrections Commission Recommendations 28
Bibliography 29

About the Commission 30

Commission Members 31

Acknowledgments 32

Appendices

A: Reports of Mr. Wiechert and Mr. Morse..... 33

B: Editorials published in Florida's newspapers 39

C: Diagram of Florida's Electric Chair 44

D: List of Courts and Cases Upholding Lethal Injection..... 45

E: Methods of Execution by State..... 48

F: Prisoners Under Sentence of Death..... 49

G: Executions in the U.S.: 1977-Present..... 50

H: Death Penalty Information Sources on the Internet 51

I: Post-Furman Botched Execution..... 52

J: Florida Corrections Commission Proposed Bill Authorizing Lethal Injection 55

Table 1. States Surveyed..... 9

Table 2. Problematic Executions 1977-1997..... 11

Florida Corrections Commission
Execution Methods Used by States
Introduction

On March 25, 1997, Pedro Medina was executed at Florida State Prison by means of electrocution. During the execution process, flames appeared from under the hood covering the head and smoke filled the chamber. Due to this apparent malfunctioning, the Florida Corrections Commission reviewed the method(s) of execution used by Florida and other states and recorded the problems encountered with these methods.

Following the execution, the Department of Corrections conducted an investigation of the proceedings (Investigation # 97-20953) and determined that the most likely cause of the problem was a corroded copper screen located inside the execution headpiece. Governor Lawton Chiles requested an independent review of the events and hired two experts: Michael Morse, an electrical engineering professor at the University of San Diego, and Jay Wiechert, an electric-chair consultant from Fort Smith, Arkansas. Their findings contradicted the department's findings and found that one of the two sponges located inside the execution headpiece was dry and had not been soaked in a saline solution. This reduced the flow of electricity which heated the wet sponge and consequently caused the dry sponge to catch on fire. Appendix A contains the reports submitted by Mr. Morse and Mr. Wiechert. It should be noted that the four pathologists assigned to conduct an autopsy of Pedro Medina stated that he was killed instantly from the electrocution and prior to the onset of the fire.

This malfunctioning has effected [sic] other Florida scheduled executions. Leo Jones' execution, scheduled for April 18, 1997, was stayed pending a hearing and ruling in circuit court of Judge A.C. Soud on the issue of Florida's electric chair's effectiveness. Although Judge Soud ruled on April 21, 1997, that the electric chair is not "cruel and unusual punishment" and that the malfunctioning was due to "unintentional human error," the Florida Supreme Court granted an indefinite stay pending a hearing in that court on May 6, 1997, to hear arguments over Judge Soud's ruling. The Florida Supreme Court subsequently granted Gerald Stano, who was scheduled to be executed on April 29, a stay until at least May 30, pending the results of the May 6 hearing.

In May the Florida Supreme Court ordered a new hearing because information related to the state's execution protocol was not heard at the April trial, and the trial did not allow sufficient time to hear experts for the defense which would have countered the state experts' testimony concerning Medina's execution. The new hearing will be conducted in July, again by Judge Soud, and will return to the Florida Supreme Court in September. Leo Jones won a stay until at least September 15. The Florida Supreme Court also ordered that Leo Jones' experts be allowed to examine the state's electrocution equipment, and that they also be allowed to view the testing of the equipment by prison officials. The test will be conducted on June 30.

Appendix B contains a number of editorials published in Florida's newspapers regarding Florida's execution method.

The Death Penalty in Florida

Florida has electrocution as its only method of execution. The electric chair was constructed in 1923 when electrocution became the official method of capital punishment as authorized by the Florida Legislature. Prior to that date, executions were carried out by counties, usually by hanging. The chair was originally located at Union Correctional Institution, but was moved to Florida State Prison in 1962. Frank Johnson was the first inmate executed in the electric chair in Florida on October 7, 1924.

On June 29, 1972, in *Furman v. Georgia*, the U.S. Supreme Court struck down the death penalty in the United States. At that time, Florida had not carried out an execution since May 12, 1964. The death sentences of 95 men and one woman were commuted to life in prison as a result of the *Furman* decision. The Florida Legislature revised the death penalty statutes in December 1972 (F.S. 921.141). These statutes were upheld by the U.S. Supreme Court on July 2, 1976 in *Proffitt v. Florida*. John Spenkelink was the first Florida inmate executed in the post-*Furman* era on May 25, 1979. To date, 234 inmates have been executed in the electric chair, thirty-nine since the reinstatement of the death penalty in 1976. Florida has carried out nine triple executions, three quadruple executions and twenty-one double electrocutions. No multiple executions have been carried out in the modem era. No woman has been executed in the electric chair.

Two recent executions encountered problems: Jesse Tafero on May 4, 1990, and Pedro Medina on March 25, 1997. During both of these executions, flames erupted under the headgear. Incorrect use of sponges in the headgear

were ultimately blamed for the problems with both of these executions. For the Tafero execution, a synthetic sponge, which was substituted for a natural sponge, ignited. In the Medina execution one of the two sponges located inside the execution headpiece had not been soaked in a saline solution. This reduced the flow of electricity which heated the wet sponge and consequently caused the dry sponge to catch on fire.

Currently, there are 380 inmates on death row in Florida: 374 men (219 white, 135 black, 20 other) and six women (4 white, 2 black). Fifty-four of these men are housed at Florida State Prison; 320 are housed at Union Correctional Institution. The six women on death row are housed at Broward Correctional Institution. The death chamber is located at Florida State Prison.

The electric chair used in Florida is a three legged oak chair constructed by inmates and is known as "Old Sparky." Executions usually take place at 7:00 a.m. Administrative shift change occurs at 8:00 a.m. By scheduling executions for 7:00 a.m., the institution is quieter and more secure. Inmates are already in lock-down.

At the time of the Medina execution, there were no written procedures for the execution process. According to testimony documented in the Department of Corrections Investigation # 97-20953, the procedure has been passed down from "generation to generation." From this report and the Department's Public Information Office, the following is the execution process: approximately one hour prior to an execution, the inmate's head and right calf are shaved. Also, a patch on the chest is shaved for the placement of a stethoscope. The inmate then showers and

returns to the holding cell, which has been stripped of all belongings. The superintendent reads the death warrant and an electrolytic gel is applied to the inmate's head and right calf. The inmate is lead [sic] into the death chamber and is strapped into the electric chair. Chin, chest, arm, wrist, waist, and leg straps are secured. A metal headpiece covers a leather hood. The hood, made at the prison, is lined with wool, and has a bronze rod with a copper wire mesh screen brazed to it on the inside. It also covers the inmate's face. A natural sponge is sewn with cotton twine onto the copper screen. Natural sponges, which have been soaked overnight in salt water, are placed at the contact points in the headgear and the leg.

The executioner is a private citizen who is paid $150 in cash. The executioner is present in the death chamber behind a screen. Information concerning the executioner and the execution team is confidential. The electricity for executions is provided by the institution's emergency generator. According to the Florida Department of Corrections, "(t)he electrocution cycle is two minutes or shorter in duration. During the cycle voltage and amperage levels peak on three occasions. Maximum current is 2000 volts and 14 amps." Florida Statutes Chapter 922.06-922.15 cover executions. The Department of Corrections has drafted written procedures since the Medina execution.

Executions in the U.S. – A Brief History

In the late nineteenth century, with the development of state penal institutions and the centralization of penal

authority within the various states, there was a movement from local to state administration of capital punishment. This transition to state authority evolved slowly from the first state-imposed execution in Vermont in 1864 through the 1880s. Most of the change occurred between the 1880s and the 1910s. (As late as 1955, four states left executions to the local authorities: Mississippi, Louisiana, Delaware, and Montana.)

Up to that time, hanging had been the predominant method of execution. Hanging had been brought to America from England by the early settlers. In 1967, two sociologists estimated that some sixteen thousand people had been executed by hanging in America. It was inexpensive and easily carried out. However, it could also be very painful, requiring up to twenty minutes for a prisoner to strangle to death. Some were decapitated. In the late nineteenth century, the "long drop" was introduced. This method of hanging uses a formula which determines the length of the rope to be used based on the weight of the prisoner. The fall is made long enough to break the prisoner's neck so that he will die almost immediately.

Despite improvements in the method, hanging fell out of favor in most jurisdictions. Many bungled executions were reported and hanging became associated with illegal lynchings. Also, the centralization of capital punishment facilitated the use of such methods as electrocution and lethal gas that were not feasible at the local level. Three states, Delaware, New Hampshire, and Washington, currently provide for hanging as an option. Since 1977, three inmates have been executed by hanging: two in Washington, and the last, in 1996, in Delaware.

In 1888, New York became the first state to adopt electrocution as its method of execution. William Kemmler was the first man executed by electrocution in 1890. Eventually twenty-six states adopted electrocution as a "clean, efficient and humane" means of execution. Today, six states retain electrocution as their only method; five others offer it as an option. It is the second most common method of execution utilized in the modern era (1977-1997).

Utah had provided for death by firing squad since territorial days in 1854 (along with hanging and beheading). Nevada also gave inmates the choice of the firing squad or hanging beginning in 1911. Only one inmate was ever executed by shooting in Nevada (in 1913 by an "execution machine" consisting of three pre-aimed rifles) before the state switched to lethal gas. Shooting was also the penalty imposed by the military for deserters in time of war, but has only been used once since the Civil War (Private Eddie Slovik, 1945). Three states (Utah, Idaho, and Oklahoma) provide for execution by firing squad today. Since 1977, there have been only two executions by firing squad, both in Utah, the last in 1996.

Nevada was the first to adopt lethal gas in 1921. In 1924, Gee Jon was the first man to die in the gas chamber. Lethal gas was seen as an improvement over hanging, firing squad, and electrocution because it was less violent and did not disfigure or mutilate the body. Eleven states adopted lethal gas, including three that had previously used electrocution. Six states currently have statutes providing for lethal gas, although none retain it as their only method. Nine inmates have been executed by lethal gas in the modern era, the last in 1994 in North Carolina.

In the post World War II years a number of factors contributed to a growing movement against the death penalty including revulsion at atrocities witnessed during the war; the burgeoning civil rights movement; attempts by the ACLU and the NAACP Legal Defense Fund to appeal death penalty cases; its abolition in a [sic] an increasing number of Western countries; and, a weakening in public support for the death penalty. During the 1950s and 1960s, ten states (Alaska, Hawaii, Delaware, Oregon, Iowa, Michigan, West Virginia, Vermont, New York and New Mexico) abolished the death penalty joining Wisconsin, Minnesota, and North Dakota, which had abolished the death penalty prior to 1920. The rate of executions began to steadily decline beginning in 1951. By 1968, exeeutions had stopped.

One of the first cases in which the U.S. Supreme Court recognized a capital defendant's right to protection under the "due process" clause of the Fourteenth Amendment was in 1932. In *Powell v. Alabama,* the Court insisted that counsel be provided for all capital defendants. Other decisions ruled against racial discrimination in jury selection (*Patton v. Mississippi,* 1947) and coerced confessions (*Fikes v. Alabama,* 1957). *Shepard v. Florida* (1951) and *Hamilton v. Alabama* (1961) clarified and extended the rulings in *Powell* and *Patton* and all "typically involved the rights of black defendants in southern trial courts." Later attacks were made against the death penalty on Eighth Amendment grounds against "cruel and unusual" punishment. In 1969 in *Boykin v. Alabama* (which argued that the death penalty for robbery was infrequent, arbitrary and discriminatory) and in 1970 in *Maxwell v. Bishop*

(which argued against finding of both guilt and punishment in one proceeding), the Court avoided the constitutional issue by sending these cases back to state courts on due process grounds. In 1971, the NAACP Legal Defense Fund brought the cases of Earnest Aikens, William Furman, and Lucious Jackson, two murderers and a rapist, before the Court, again, on the discriminatory and capricious way, the death penalty had been imposed. During the Court's deliberation, Aiken's death sentence was nullified when the California Supreme Court ruled in *People v. Anderson* that capital punishment was unconstitutional under that state's prohibition against cruel and unusual punishment, leaving *Furman v. Georgia* as the lead case. (New Jersey's supreme court had also nullified that state's death penalty prior to the *Furman* decision.)

On June 29, 1972, the Supreme Court ruled in *Furman v. Georgia* and related cases "that the imposition and carrying out of the death penalty in these cases constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Justices Brennan and Marshall held that the death penalty, whatever its statutory form, was cruel and unusual. The remaining three justices in the majority, Douglas, Stewart, and White, more narrowly defined their objection: current statutes allowed for too much discretion by juries and the punishment was applied so infrequently and in such an unpredictable manner that it was likened to being struck by lightning. Infrequent application would fail to act as a deterrent and thus, compared to other available punishments, did not serve a justifiable purpose. The Court reversed the death sentence of some 120 cases. The *Furman* decision invalidated the death-sentencing schemes in

thirty-two states and the District of Columbia and affected some 629 death row inmates nationwide. Generally, these inmates had their sentences commuted to life or other long term sentences by the governors of the various states.

According to Adam Bedau (an anti-death penalty advocate):

> Within a year after *Furman*, commissions had been formed in several states to make recommendations on the issue, and bills to restore capital punishment had been introduced in three dozen legislatures. By midsummer, such bills had already been signed into law in twenty states. On the second anniversary of *Furman*, twenty-eight states had new death penalty legislation and more than 100 persons in seventeen states had been sentenced to death under these new laws.

By 1976, thirty-five states had enacted new death penalty statutes and these cases had made their way to the U.S. Supreme Court. On July 2, the Court ruled in *Gregg v. Georgia* that "the punishment of death does not violate the Constitution" provided that "guided discretion" is exercised in imposing the penalty, and allowed capital punishment to resume after a decade-long moratorium on executions. On that same date, the Court upheld the new death penalty statutes in Florida *(Proffitt v. Florida)* and Texas *(Jurek v. Texas)*, but struck down those in North Carolina *(Woodson v. North Carolina)* and Louisiana *(Roberts v. Louisiana)* which provided for mandatory death sentences. Of the statutes passed that were ultimately upheld by the Supreme Court, all contained provisions for automatic appellate review of death sentences.

Later, the death penalty statutes in New York and Massachusetts were declared unconstitutional by their state supreme courts. After the *Anderson* decision, California passed a constitutional amendment allowing for the death penalty. In 1977 in *Coker v. Georgia,* the Supreme Court ruled that rape of an adult woman did not warrant the death penalty. In the four years between the *Furman* and the *Gregg* decisions, over 600 prisoners were sentenced to death. Six months after *Gregg,* in January 1977, Gary Gilmore became the first person executed under the post-*Furman* statutes.

At the time executions in the United States resumed, many states had not executed anyone for over twenty, sometimes thirty, years. Previously used equipment, such as electric chairs and gas chambers, were old, needed expensive repairs, and had experienced problems in the past. Also, many states felt that a modern technique embodying the latest methods was needed. Lethal injection had first been proposed in 1888 when New York considered it but ultimately opted for electrocution. In 1977, Oklahoma became the first state to adopt lethal injection. Texas performed the first execution by lethal injection in 1982 with the execution of Charlie Brooks. To date, sixteen states have lethal injection as their only method of execution; sixteen others provide for it as an option. It is by far the most common method employed, with over 246 inmates put to death by lethal injection since 1982.

Appendix D contains a list of courts and cases upholding lethal injection as a method of execution.

Methods Of Execution By State

A report compiled by the Bureau of Justice Statistics, *Capital Punishment 1995,* and a telephone survey conducted April 1997 by the Staff of the Florida House of Representatives, Committee on Corrections, indicate that of the fifty states and the District of Columbia, thirty-eight states have a death penalty and differing methods of execution: lethal injection (32), electrocution (11), lethal gas (6), hanging (3), and firing squad (3). Several states have more than one method of execution. Twelve states and the District of Columbia have no capital punishment. See Appendix E, "Methods of Execution by State."

According to information from the Bureau of Justice Statistics and the NAACP Legal Defense Fund, there are over 3,000 prisoners under the sentence of death. Over 40 percent of these prisoners reside on death rows in California, Texas, and Florida. See Appendix F "Prisoners Under Sentence of Death."

Since the *Gregg* decision of 1976, as of June 15, 1997, 394 executions have been conducted. From 1977 to 1997, the lethal injection method has comprised the greatest percentage of all executions at 62.44%. Lethal injection is followed by electrocution at 34.01%; gas chamber at 2.28%; firing squad at 0.51%; and hanging at 0.76%. It is interesting to note that from 1977 to 1990 electrocution was the most prevalent method at 59.44% followed by lethal injection at 35.66%; but from 1991 to 1997 lethal injection leads at 77.69% followed by electrocution at 19.52%. See Appendix G "Executions in the U.S. 1976-1997."

Appendix H contains a list of death penalty information sources available on the Internet which provide both national and Florida death penalty statistics.

Survey of States

Methodology

Between April 7 – April 18, 1997, staff of the Florida Corrections Commission conducted a telephone survey of seventeen selected states to discuss their chosen method(s) of execution. Although some states have the statutory authority to use lethal gas, firing squad and/or hanging, the survey focused on states using lethal injection and electrocution. Currently, thirty-two states allow for execution by lethal injection and eleven use electrocution. Sixteen states provide for two or more methods of execution. Generally, the surveyed states were selected because: (1) the high number of inmates executed by lethal injection; (2) recent changes in statutes to provide for execution by lethal injection; and, (3) use of electrocution. Table 1. details the states surveyed and the reason for their inclusion.

Table 1.

State	Reasoned Surveyed
Alabama	Uses electrocution as its only method of execution.
Arkansas	High number of inmates executed by lethal injection. Provides for both electrocution and lethal injection.
Connecticut	Recently amended statutes providing for lethal injection as its only method of execution. (No executions to date.)
Georgia	Uses electrocution as its only method of execution.
Illinois	High number of inmates executed by lethal injection.
Indiana	Recently amended statutes providing for lethal injection as its only method of execution. (One execution by lethal injection to date.)
Kentucky	Uses electrocution as its only method of execution.
Missouri	High number of inmates executed by lethal injection.
Nebraska	Uses electrocution as its only method of execution.
New York	Recently adopted the death penalty; chose lethal injection.
Ohio	Provides for both electrocution and lethal injection. (No executions by lethal injection to date.)

Oklahoma	High number of inmates executed by lethal injection. Provides for both electrocution and lethal injection. First state to adopt lethal injection as its primary method of execution.
Pennsylvania	Recently amended statutes providing for lethal injection as its only method of execution. (Two executions by lethal injection to date.)
South Carolina	Provides for both electrocution and lethal injection. Recently amended statutes to provide lethal injection as an option.
Tennessee	Uses electrocution as its only method of execution.
Texas	High number of inmates executed by lethal injection. First state to execute an inmate by lethal injection.
Virginia	High number of inmates executed by lethal injection. Provides for both electrocution and lethal injection.

The surveyed states were asked to describe their execution procedures and if those procedures were in writing; composition of the execution team, including any medical personnel; problems encountered during executions; and, any documented costs of execution equipment. If the state used lethal injection, either as its only method of execution or as an option, they were asked what prompted the change, what method was used previously, and any legal ramifications of the change in methods. Detailed information obtained from each state surveyed is contained on pages 14 through 28.

States using lethal injection not included in the survey (followed by the number of executions by lethal injection to date) are: Arizona (6), California (3), Colorado (0), Delaware (7), Idaho (1), Kansas (0), Maryland (1), Mississippi (0), Montana (1), Nevada (5), New Hampshire (0), New Jersey (0), New Mexico (0), Oregon (2), South Dakota (0), Utah (3), Washington (0), and Wyoming (1).

Highlights of Survey

- Almost all states surveyed have written procedures regarding the execution process.
- Electric chairs were built by either inmates or an outside contractor.
- States using the electric chair use natural sponges soaked in a brine (not just saline) solution. Prevalent use of copper devices in headgear, but ranges from mesh, to solid, to perforated devices.
- Most common reason stated for change from electrocution to lethal injection was that it is considered "more humane method of execution."
- All states surveyed utilizing lethal injection as a method of execution administer the drugs manually and do not utilize a machine. States cited the possibility of malfunctioning machinery as the reason why drugs are administered manually.
- Most commonly used drugs for the lethal injection procedure are sodium pentothal (puts the inmate to sleep); second, pancurium bromide (stops respiration); and, third, potassium chloride (stops the heart). Usually between each drug a saline wash is used.
- Virginia has a mandatory 10 mg. intramuscular injection of Thorazine because the inmate is more relaxed and it makes it easier for the technician to insert the IV. Other states offer a sedative injection as an option.

- Composition of the execution team: most teams are comprised of department of corrections personnel; however, Arkansas uses community-based medical personnel in its lethal injection procedure. Team members are either voluntary or appointed. Several states cited screening and evaluation of members, post-execution debriefing sessions, and the availability of counseling.

- States cited the need for statutory provisions regarding protection of medical personnel from censure from professional associations with regard to their involvement in the execution process.

Problems Encountered

Michael Radelet, chairman of the University of Florida Sociology Department maintains a list of "Post-Furman Botched Executions" which is posted on the internet (See Appendix l). As of June 15, 1997, twenty-two executions which encountered problems during the execution process are listed. Of the twenty-two executions, thirteen related to lethal injections; eight related to electrocution; and one related to the gas chamber. Texas has seven; Virginia, Florida, Alabama, Oklahoma, and Indiana have two each; Mississippi, Georgia, Arkansas, Illinois, and Missouri each had one. Florida's two executions included were: Jesse Joseph Tafero on May 4, 1990, and Pedro Medina on March 25, 1997. Although most states contacted confirmed the above problems, Texas and Georgia stated that they had encountered no problems in their respective executions. Table 2. Depicts the percentage of problematic executions to total executions from 1977 to 1997.

Table 2.

Problematic Executions 1977-1997

	Lethal Injection	Electrocution	Gas	Firing Squad	Hanging	Total
Number Executed	246	134	9	2	3	394
Number Problematic	13	8	1	0	0	22
% Problematic	5.28%	5.97%	11.11%	0.00%	0.00%	5.58%

Source: Compiled from "Executions in the U.S. 1976-1997," Death Penalty Information Center and "Post-Furman Botched Executions" as of June 15, 1997.

Problems encountered with the process of lethal injection dealt with the:

- Difficulty of locating a viable vein to establish the intravenous connection
- Violent reaction to lethal drugs
- Tightness of leather straps which prevented the flow of chemicals into the veins
- Lethal drugs clogged the tube and stopped the process, and the clogged tube had to be replaced.

Problems encountered with the process of electrocution dealt with:

- Burning of varying degrees of parts of the body
- First jolt of electricity not sufficient to kill.

Details of Survey of States

Alabama

Has electrocution as its only method of execution. Has had a bill introduced during previous legislative sessions to give inmates currently on death row the option of lethal injection and having lethal injection as the only method for those sentenced after the bill becomes law. There is no sponsor currently for that legislation and Department of Corrections is not lobbying for it.

The electric chair was first used in 1927 and was built by inmates. There have been 167 executions in the chair. The headgear is also believed to be "homemade." The

electrical components were updated in 1991 for approximately $26,000 by Jay Wiechert, an electrical engineer from Fort Smith, Arkansas (and the expert brought in by Governor Chiles to review the Medina execution). The headgear is leather with a copper screen and natural sponge, soaked in brine, sewn in. A single leg electrode is place on the inmate's left leg. A cloth mask is placed over the inmate's face last. A single switch is used to apply the current. An electrical engineer is contracted to check out the equipment before each execution. Confidential procedures available to criminal justice agencies on request. Alabama reported difficulties with their first post*Furman* execution in 1983. A heartbeat was detected after the application of the first cycle and another cycle was administered. Corrections officials believe they simply did not wait long enough before checking for a heartbeat.

The warden is responsible for assembling the execution team. (No further information was available on this matter.)

The death chamber is located at Holman Prison and death row inmates are housed at Holman Prison and Donaldson Correctional Facility (males) and Julia Tutwiler Prison for Women (females). Death row inmates were first housed at the Donaldson facility when the number of death row inmates exceeded the available space for them at Holman.

There have been sixteen executions since 1977 to June 15, 1997.

Arkansas

Has the option of lethal injection or electrocution. For offenses committed after July 4, 1983, lethal injection is the only method of execution; for offenses committed prior to that date the inmate may choose either method. Since change in law, some inmates have chosen the electric chair. Change in law because lethal injection option considered more humane. Inmates must choose method seven days prior to execution and method chosen is documented.

Have written procedures for both lethal injection and electrocution. Confidential procedures available to criminal justice agencies on request.

Death house is used for both methods of execution and is located at the Cummins Unit. This institution houses maximum, medium, and minimum security inmates. Housing for death row inmates is located at another institution. The inmate is transferred to the Cummins Unit within 72 hours prior to the execution.

State has had multiple executions on same night on several occasions. Executions are conducted on the same day because it is considered easier on staff.

Execution Team has three components:

1. Administrative Staff – director, warden of institution, executive staff.
2. Tie-Down and IV team – tie down team consists of volunteer Department of Corrections correctional officers who retrieve, escort, and secure inmate on gurney or execution table. IV team consists of volunteer community-based medical personnel qualified to

insert IV lines or perform cut-down (surgical incision to locate a vein) procedures.

3. Institution Staff to provide security lock-down – warden's staff.

Lethal Injection:

Department of Corrections Medical Administrator purchases IV lines, drugs, other medical materials and supplies. This position also packages lethal drugs for use in execution and is then kept under lock and key. Drugs used are based on University of Texas School of Pharmacy research to find most effective and quick-acting agents.

Three agents used in a sequence in specific concentration for shutdown of body.

1. Sodium Pentothal – induction agent renders inmate unconscious and shuts down respiratory and cardiac; toxic amounts but not lethal
2. Sodium Chloride wash – to wash sodium pentothal out of IV line
3. Pancuronium Bromide "Pavulon" – paralytic curare – smooth muscle paralytic, shuts down respiratory – toxic but not lethal
4. Sodium Chloride wash – to wash pancuronium bromide out of IV line
5. Potassium Chloride – electrolyte which reverses polarity of heart muscles – shuts down heart

Drugs are administered in a sequence – not one mix. Some of the drugs cannot be mixed because they will

crystallize and subsequently will not be effective. The example of John Gacy's execution in Illinois was described in which a single line was used. Sufficient wash was not used between drugs and the drugs crystallized which in effect stopped the process.

Do not use a machine because of possibility of malfunctions. Two separate IV lines are inserted into inmate. IV Team insert IVs but executioner actually administers drugs and executioner identity unknown. Team in execution chamber is in a locked room can see out but no one can see in. Execution chamber contains controls for electrocution and for lethal injection devices. Executioners are in executioners' room well in advance to execution, and have private meeting with Medical Administrator prior to execution. Use a standard hospital gurney with three to four inch pad with extended arm. On lethal injection, use leather gauntlets of generic size to secure fingers, palms, wrists. Medical Administrator wears low-frequency headset and stands next to condemned man. Headset allows for communication with executioner and can direct which IV line to use if problems arise. Have EKG monitor to establish flatline on inmate and use coroner to determine death.

Have extensive rehearsal within two to three weeks of execution including all participants. Have two rehearsals with a volunteer officer of same approximate weight and height of inmate who is instructed to "cause trouble" in the rehearsal. After execution have debriefing and counseling is also made available.

Electrocution:

Use stout salt solution and disc of copper – solid copper concave device three inches in diameter which is soldered to top of headpiece; use sponges which extend beyond copper device. Headpiece and chair built by inmates or DC.

Have legislation which states any medical personnel involved "cannot be disciplined by any licensing board." Also prohibits identification of executioner or anyone not governed by policy.

There have been fifteen executions from 1977 to June 15, 1997; thirteen by lethal injection and two by electrocution.

Connecticut

Connecticut changed method of execution from electrocution to lethal injection effective October 1, 1995. Currently they are drafting written procedures for lethal injection method. Connecticut has reviewed lethal injection procedures from half dozen other states and visited North Carolina, Arizona, Arkansas, Delaware, and Texas. The change does not allow for an option for inmates sentenced to death prior to the effective date.

No one has been executed since the 1960s. The electric chair is scheduled to be placed in a museum. Used leather cap/straps with chair. Chair was made in early 1900s.

Next scheduled execution most likely within one year since appeals almost exhausted.

Daniel Webb, inmate, has filed appeal based on change from electrocution to lethal injection.

Execution team will be composed of all DC personnel. All personnel will be voluntary, and then screened and interviewed. Lethal injection will be administered via IV; staff to be trained in medical procedure; DC physician on board to monitor EKG.

Drugs used will be three drugs: sodium pentothal, saline solution, followed by pancuronium bromide "Pavulon," saline solution, and then followed by potassium chloride.

Georgia

Electrocution is the only authorized method of execution.

The original electric chair was built in 1938 by inmates and is in a museum. The execution chamber and electric chair utilized now were built by inmates in 1976. The electric chair has a headband; the electrode makes contact with one sponge. The electrical components were purchased from a firm in Arkansas.

Electrical equipment was also purchased to conduct tests on the electric chair to ensure that it functions properly. Several tests are conducted prior to an execution.

The membership of the Execution Team is confidential and ranges from six to nine members. The members of the Execution Team are internal to the agency and the members are compensated $100 each. The Execution Team practices a range of potential inmate scenarios to

ensure that they are prepared and that each execution proceeds according to plan.

Georgia has an execution manual that details the process, procedures, and steps associated with executions; however, the contents of the manual are confidential.

No problems were reported with any executions.

There have been twenty-two executions from 1977 to June 15, 1997.

Illinois

Has lethal injection as only method of execution. Prior to change in method used the electric chair. Has written procedures which are confidential, but available upon written request from other correctional agency.

Execution Team consists of two teams: one of security staff; other for prior to execution. All teams composed of volunteers. The executioner is known only to director/warden. All staff involved on teams attend a debriefing after execution.

Used machine to administer drugs for lethal injection three to four years ago, but switched to manual push due to possibility of problems with machines.

Use three drugs with saline washes between drugs: sodium pentothal, saline solution, followed by pancuronium bromide, saline solution, and then followed by potassium chloride. All doses are administered in lethal dosage amounts. Two IVs are inserted: primary and secondary. The IVs are started prior to opening the curtains

for witnesses. There is a direct line from executioner chamber to inmate.

In prior use of electric chair, two doses of electrical power were administered. Used natural sponges.

State statutes restrict professional medical associations from censuring medical personnel involved in executions. In the past, the AMA has lobbied to delete this provision from the statutes.

There have been eight executions from 1977 to June 15, 1997, all using lethal injection.

Indiana

Indiana changed the method of execution from electrocution to lethal injection effective July 1, 1995. Discussion with the Public Information Officer of the Indiana Department of Corrections (IDOC) indicates that the state changed its method because lethal injection is viewed as a more humane method of execution, but more importantly, is less stressful on the staff involved in the execution. The change did not allow for option; even those cases prior to effective date of law will be executed by lethal injection. Indicated that there are cases pending regarding the use of lethal injection as "cruel and unusual punishment." Death warrant had to be modified to indicate lethal injection as method of execution instead of electrocution.

The methodology of the lethal injection process is patterned after Illinois' methodology. Initial costs involved the renovation of the execution room. IDOC has written procedures on the process, but the procedures are confidential.

Execution Team composed of approximately fifteen people, all volunteer IDOC personnel composed of correctional officers and medical staff. All receive extensive training, and a psychological evaluation prior to placement on team, and may leave the team upon their request.

A catheter is inserted into each arm with IV attached in which three drugs are administered in sequential order: sodium pentothal, saline solution, pancuronium bromide, saline solution, potassium chloride.

Tape available which shows execution chamber prior and after change in execution method.

There have been four executions from 1977 to June 15, 1997; three by electrocution; one by lethal injection.

Kentucky

Electrocution is the only authorized method of execution. The last execution was in 1962, although one execution is tentatively scheduled for July 1, 1997. Legislation proposing the use of lethal injection as an optional method of execution has been drafted, and a special session of the Kentucky Legislature may occur in the fall.

All male inmates under sentence of death are housed at Kentucky State Penitentiary. All female inmates under sentence of death are housed at the Kentucky Correctional Institution for Women. The electric chair is located at Kentucky State Penitentiary.

No later than twenty-four hours prior to the time of execution, any inmate sentenced to death is transferred

from Death Row to a special housing unit located at the Kentucky State Penitentiary adjacent to the electric chair.

The electric chair was built by inmates in 1911; however the electronics were replaced in the 1950s. The electronics will be replaced again prior to the execution tentatively scheduled for July 1, 1997.

The identities of the members of the Execution Team are confidential and known only to select staff. The Execution Team consists of twelve persons internal to the Department of Corrections and has no members that are external to the agency. The warden selects three of the twelve member Execution Team to participate in an execution. The members of the Execution Team are from other institutions that do not house death row inmates to reduce the likelihood of a correctional officer participating in the execution of an inmate he/she previously had contact with. Members of the Execution Team are not compensated.

Louisiana

Has lethal injection as only method of execution; switched from electric chair in 1991 because it is considered more humane.

Last execution by electric chair conducted in 1991. Worst problem encountered was a third degree burn on right leg during an electrocution. Procedures required a certified electrician on premises during execution. Used a cloth mask over head, sponges on head and right leg, and a leather headpiece. Electric chair will be put in museum.

The last lethal injection execution had difficulties finding a vein. Stated that there are no written procedures. Machine not used in procedure, manual push used. Executioner administers drugs. Medical personnel (not doctors or nurses but most likely emergency medical technicians) in chamber. DC medical personnel selected by warden, although they do not have to be on execution team if they do not want to. Personnel rotated for each execution. Medical personnel tell executioner how to administer injections. Warden remains in execution chamber with inmate; executioner in a separate room that has a one way mirror. Curtains are drawn in execution room during preparation – witnesses don't see inmate until inmate is prepped completely. An IV is inserted in both arms; if needed can insert an IV in ankle.

Three drugs are administered in sequential order: sodium pentothal, saline solution, pancuronium bromide, saline solution, potassium chloride. Each drug is administered in a lethal amount. Process takes approximately five to seven minutes; all executions conducted at 12:01 midnight.

ABC *Prime Time Live* tape available.

There have been twenty-four executions from 1977 to June 15, 1997; twenty by electrocution and four by lethal injection.

Missouri

In 1988, legislation was passed that gave the Director of the Department of Corrections the discretion to use either the gas chamber or lethal injection. Since the first

execution by lethal injection in 1989, Missouri has executed twenty-four inmates, all by lethal injection. (Prior to 1989, Missouri's last execution had been in 1965.) Written procedures for executions are considered confidential. Missouri estimates that the cost of an execution is approximately $6,300. The majority of those costs are associated with overtime paid to staff. The costs of drugs used are estimated to be $175. Until two years ago, Missouri used a lethal injection machine. They have since switched to manual push because it was easier to use than the injection machine.

Execution procedure: Inmates are given the option of receiving a sedative by injection prior to the execution. The "executioners" (two at each execution) are Department of Corrections employees. A contracted, "trained medical professional" inserts an IV line and a saline drip is started. The IV line leads into tubing, which in turn is run into an adjoining room. The executioners cannot see the inmate. One executioner manually pushes the drugs into the IV line; the other executioner releases a clamp which releases the drugs. Drugs used, in order, are sodium pentothal, pancurium bromide, and potassium chloride.

Executions by lethal injection are carried out at Potosi Correctional Center, where death row inmates are also housed. The gas chamber is at Jefferson City Correctional Center. For all practical purposes, the gas chamber is no longer used and would be very expensive to repair.

There have been twenty-four executions from 1977 to June 15, 1997, all by lethal injection.

Nebraska

Has electrocution only; lethal injection considered in past, but currently no changes are being considered.

Original electric chair was built in early 1900s. In 1945 the electrical components (transformer, etc) were upgraded. Use copper electrodes; sea sponges soaked in brine. Copper headpiece similar to a fan blade – eight perforated blades round in shape sits on head; oval shape copper piece placed on leg. Headpiece is constructed of leather with leather straps.

Personnel assigned to the execution team by the warden/director and the same people are used every time. Same location for execution chamber and death row. Close to execution date, inmate kept in hospital at institution and transported to basement (execution chamber) on day of execution.

Have confidential written procedures. The last execution was conducted in July 1996. Electric chair maintained by outside contract; test working order of equipment by boiling water in barrel for one minute.

There have been only two executions from 1977 to June 15, 1997. The worst reported problem encountered during an execution was a small blister on calf of leg and state did not experience any problems with head burns.

New York

Reinstated the death penalty effective September 1, 1995. Lethal injection is the only method authorized. Lethal injection was chosen as the method of execution by a conference committee of representatives from the

state assembly, state senate, and governor's office when the death penalty bill was being formulated. There was no testimony or evidence presented, nor controversy over choosing lethal injection. No executions have been carried out to date.

Ohio

Have option of lethal injection or electrocution. Inmate chooses method seven days prior to execution. If none chosen, method defaults to electrocution. Law was changed effective July 2, 1993, by State General Assembly. No specific case was cited for reason for change. Have not had an execution since 1963.

Oklahoma

Lethal injection is the authorized method of execution since the death penalty was reinstated in 1976. However, Section 1014, Oklahoma Statutes, authorizes electrocution should lethal injection ever be held unconstitutional and the use of a firing squad should both lethal injection and electrocution ever be held unconstitutional. The state's decision to switch from electrocution was not related to any problems or a specific case.

Statutes are not highly prescriptive regarding the composition of the Execution Team. The statutes authorize the Warden to select three volunteers to administer the drugs into the intravenous lines after the two IVs (one in each arm) have been inserted by medical staff. The three selected volunteers are not required to be medically trained, nor are they required to be internal to the agency.

The volunteers' identities are hidden by hoods being worn and their identities are known only to the Warden and the Unit Manager. Each volunteer is paid $300.

The administration of the drugs is done manually because Oklahoma determined that a machine was prone to mechanical problems. The drugs are injected by hand held syringes sequentially into the IV lines, alternating between the two lines. The sequence of drugs is in the order listed below. Saline is also injected into the line after each drug is injected. Each of the three executioners injects one of the drugs.

Three drugs are administered: sodium thiopental; pancuronium bromide; and potassium chloride.

The Death Row population is 136 (132 men and 4 women). Men are held at Oklahoma State Penitentiary in McAlester and women are held at Mabel Bassett Correctional Center in Oklahoma City, Oklahoma. All executions take place at the Oklahoma State Penitentiary in McAlester, Oklahoma.

Oklahoma has conducted nine executions since 1977, with the first occurring in 1990, all by lethal injection.

Pennsylvania

Lethal injection is the only method authorized. Pennsylvania has executed two inmates by lethal injection since statutes were changed c.1994-95 and have reported no problems. The state had previously used electrocution, but had not performed an execution since 1963 and were afraid of equipment failure because of the age of the equipment and problems experienced in the past. Written

procedures for executions are considered confidential. The estimated costs of drugs used is between $200-$300. Costs in Pennsylvania may run slightly higher than in other states because drugs are purchased in bulk and often expire before use.

Execution procedure: The "executioners" (two at each execution) are citizen volunteers. The executioners are paramedics, trained as IV technicians and are capable of performing cut downs, if necessary. The executioners insert an IV line into each arm and a saline drip is started. The IV lines are run into an adjoining room, separated from the death chamber by a two-way mirror. The executioners manually push the drugs into the IV line. Drugs used, in order, are sodium pentothal, pancurium bromide, and potassium chloride. The IV lines are flushed with saline solution between the administration of each of the drugs to avoid clogging the lines. Death is determined by visual observation.

Pennsylvania patterned their procedures after visiting and observing the methodology used in Texas. Executions are carried out at the State Correctional Institution at Rockview. Death Row inmates are housed at three other institutions. It is easier on staff if they do not personally know the condemned inmate.

Two inmates have been executed from 1977 to June 15, 1997.

South Carolina

Statutes were revised in 1994 to add lethal injection as a means of execution and allow condemned persons

the right to choose their method of execution in order to be more humane. All condemned persons now have to choose the method of their execution within thirty days of the scheduled date of their execution. For those condemned persons that refuse to choose and were sentenced before January 1995, the method of execution shall be electrocution; however, for those condemned persons that refuse to choose and were sentenced after January 1995, the method of execution shall be lethal injection.

The state's decision to switch from electrocution was to be more humane and was not related to any problems or a specific case.

The identities of the members of the Execution Team are confidential and known only to select staff. The Execution Team consists of three persons internal to the Department of Corrections and has no members that are external to the agency. Members of the Execution Team are not compensated. In prior years, there was outside members that were paid; however, the new Commissioner abolished the policy and felt it was not cost-effective.

The administration of the drugs is done manually. Two IVs (one in each arm) are inserted by contracted Emergency Medical Technicians. The drugs are injected into one IV line, and the line is flushed with saline after each injection. The second IV line is used in those instances where there is a problem with the first IV line. If death does not result within ten minutes of the last injection, the drugs are readministered.

South Carolina is in process of establishing a Capital Punishment Facility (CPF) that will be separate from its

Death Row. Death Row is being moved to another institution in order to maintain anonymity for the agency staff involved and not for any issues related to the condemned persons. Condemned persons will be housed in the CPF one week prior to the scheduled date of their execution.

There have been twelve executions from 1977 to June 15, 1997. Of the twelve executions, five were by electrocution and seven by lethal injection.

Tennessee

Has electrocution as its only method of execution. The state has not had an execution since 1960. The chair was rebuilt by Fred Leuchter, an engineer from Massachusetts, in 1989. There are written procedures, some of which are made available to the public. The warden chooses the execution team from volunteers of correctional staff. The team practices and reviews procedures once a month.

The electric chair is computer controlled: there are dual controls and the computer decides which "switch" executes the inmate. There are also manual controls as a back-up. There are two electrodes attached to the leg and one in the headgear. The headgear is a leather "skull cap" with a 2-inch copper band on the inside. An elephant ear sponge, soaked in salt water is used.

Death row and the death house are located at River Bend Maximum Security Institution in Memphis. The female death row inmates (two) are housed at Tennessee Prison for Women.

A bill was introduced approximately two to three years ago to switch to lethal injection, but it did not generate a lot of interest. Officials estimate that it may be one to one and one-half years before an execution occurs.

Texas

From 1928 until 1964, the method of execution was electrocution. The electric chair was built by inmates in 1924 and now resides in a Texas Department of Criminal Justice museum. In 1977, lethal injection was adopted as the new method of execution in Texas. On December 7, 1982, Texas became the first state to use lethal injection as a means of execution.

The execution chamber has been located at the Huntsville Unit since 1924 and is still utilized. There are twelve cells immediately adjacent to the execution chamber that are used to house an inmate prior to execution.

Male Death Row inmates are located at the Ellis I Unit. Female Death Row inmates are housed at the Mountain View Unit in Gatesville, Texas.

Any inmate scheduled for execution is transported from the I/Mountain View unit to the Huntsville Unit to carry out the execution. Transportation arrangements are known only to the unit wardens involved and the exact time, method, and route of transfer are not public information. The Director's Office and the Public Information Office are notified immediately after the inmate arrives at the Huntsville Unit.

The identities of the members of the Execution Team are confidential and known only to select staff. The Execution Team consists of four persons internal to the Department of Criminal Justice and has no members that are external to the agency. Members of the Execution Team are not compensated.

The administration of the drugs is done manually. Two IVs (one in each arm) are inserted by medical staff: The drugs are injected into one IV line, and the line is flushed with saline after each injection. The second IV line is used in those instances where there is a problem with the first IV line. If death does not result from the last injection, the drugs are readministered. There are three administrations of the drugs available.

The drugs administered are: sodium thiopental, followed by pancuronium bromide, followed by potassium chloride.

The time of execution was changed in 1994 from midnight to 6:00 p.m. This was done in response to the workload in the Governor's Office associated with an execution. Changing the time of execution has resulted in a reduction of overtime for many of the staff involved.

There have been 128 executions by lethal injection from 1982 to June 15, 1997. Texas reports no problems with any executions.

Virginia

Passed legislation, effective January 1, 1995, giving the inmate the choice of electrocution or lethal injection. If the inmate does not make the choice, execution will be

by lethal injection. The sponsor of the legislation believed that lethal injection was a more modern method of execution and because there had been problems with the electric chair, he was afraid that electrocution would be declared unconstitutional. Initially $50,000 (using Louisiana's figures) was allocated for implementing lethal injection executions. However, officials have found that it cost approximately $5,000 for the equipment (gurney, tubing, and drugs).

Since allowing for lethal injection, fifteen inmates have been executed, all by lethal injection. (One inmate chose electrocution, but his execution was stayed. It is believed he chose electrocution to create more publicity.) No problems have been reported.

Execution procedure: Approximately one hour prior to the execution, the inmate is given a 10 mg. intramuscular injection of Thorazine. This procedure was once elective but is now mandatory. Corrections staff has found that by giving this shot, the inmate is more relaxed and it is easier for the technician to insert the IV. The IV line is inserted by correctional health staff. The drugs are administered from behind a partition in the execution chamber. Two correctional officers take turns manually pushing the drugs into the IV tubing. Virginia does not publicly disclose the drugs they use. A heart monitor is attached to the inmate and is read from behind the partition.

Electrocution is an option in Virginia. The last execution by electrocution was in April 1994. The chair was built by inmates in the 1960s. The electrical equipment was updated in 1990. Jay Wiechert designed the new

equipment. Virginia officials decided to keep their old "headgear." First, a leather "Halloween-style" mask is placed over the inmate's face. A brass helmet, lined with natural sponge soaked in salt water is then placed on the inmate's shaved head. The "helmet" is hinged in the middle to allow it to fit different head sizes. A leather strap is used to secure it in place. They do not used any type of electrolytic paste. One electrode is placed on the inmate's leg. Again, a leather strap secures the electrode in place. A cycle of thirty seconds of high voltage, followed by sixty seconds of low voltage is used. The heartbeat is checked five minutes after the cycle has been administered. (After the equipment was changed in 1990, the engineer who designed the equipment recommended a cycle of ten seconds of high voltage, followed by fifty seconds of low voltage. The heartbeat was checked after two minutes. The second execution that was performed this way resulted in a detectable heartbeat and another cycle was administered. Since that time, officials reverted to the original procedure.) The execution team for both lethal injection and electrocution executions are the same (with the exception of the IV technicians). Executions are generally scheduled for 9 p.m. for the convenience of the staff.

The execution room for both electrocution and lethal injection is the same. For lethal injection, a partition is drawn across the room, concealing the electric chair from the witnesses. It is from behind this partition that the drugs for the lethal injection are administered.

Executions are carried out at Greensville Correctional Center. Death row inmates are housed at Mecklenburg

Correctional Center. Virginia officials recommend housing death row inmates in a facility separate from the death house. In the 1980s, when the death row and the death house were both located in Richmond, a death row inmate had become a "hero" to the other inmates because of an earlier escape. When the inmate was executed, the other inmates rioted.

There have been a total of thirty-nine executions from 1977 to June 15, 1997; twenty-four by electrocution and fifteen by lethal injection.

Previous Legislation Proposed by Florida Legislature

The Florida Legislature has considered several bills over the last few years to change the method of execution from electrocution to lethal injection.

- HB 156 by Representative D. L. Thomas filed in the 1986 Legislative Session. Would have allowed offenders under sentence of death to choose between electrocution or lethal injection as method of execution. The analysis spoke to the cost of administering lethal injections, which ranged from the least expensive method such as Texas, which used medically trained personnel to administer the lethal injection, to New Jersey, who had purchased a computer controlled injection machine at a cost of $18,000. HB 156 died in the House Committee on Corrections, Probation and Parole.
- CS/SB 539 by Senate Committee on Corrections Probation and Parole, Senator Hair and others; and CS/HB 911 by Representative Upchurch filed in the 1988 Legislative Session. Would have provided for lethal injection as an alternative method of execution to electrocution. The decision would have been made by the

inmate one week prior to the execution. Provided that method of execution would default to electrocution if the Florida Supreme Court or the United States Supreme Court determined that lethal injection was unconstitutional. Both bills also provided that the lethal injection method would not constitute the practice of medicine, and would authorize pharmacists to provide drugs for this purpose. The analysis pointed out the controversy surrounding doctors administering the lethal injections. CS/SB 539 was passed by the Committee on Corrections, Probation and Parole and placed on the Senate Special Order Calendar. CS/HB 911 passed the House of Representatives, was read for the first time in the Senate, and referred to the Senate Committee on Corrections, Probation and Parole. On May 17, CS/HB 911 was withdrawn from the committee, substituted for CS/SB 539 (which was on the Special Order Calendar), read for the second time, and subsequently died on the Senate Calendar.

- HB 15 by Representative Garcia filed in the 1991 Legislative Session. Would have substituted lethal injection for electrocution for method of execution. HB 15 passed out of the Classification and Reorganization Subcommittee and died in the Full Committee on Corrections. The bill analysis presented the following points:

  - ◊ State would experience a probable increase in litigation arising against lethal injection as "cruel and unusual punishment" which is prohibited under the Eighth Amendment to the U.S. Constitution.

  - ◊ Whereas other federal circuit courts of appeals have upheld the use of lethal injection as a method of execution, 11th Circuit has not addressed the issue because the three states

which compose the 11th Circuit (Alabama, Georgia and Florida) all use electrocution as their method of execution.

- ◊ The retrospective nature of bill would apply the new method of execution to existing death row inmates. The analysis suggested either amending the bill to apply to prospective crimes, or allowing a choice in method of execution would circumvent litigation by existing death row inmates.

- ◊ The absence of a clause stating that administration of lethal injection would not be construed as the practice of medicine; and a clause releasing pharmacies from dispensing controlled substances without a prescription.

- ◊ The lack of a fallback position if lethal injection was declared as cruel and unusual punishment.

- ◊ The Department of Corrections reported a negligible fiscal impact associated with the switch in execution method. The department would have to either build or purchase the associated equipment. The department also reported the cost of one execution by electrocution as follows: executioner's fee $150.00; Last Meal $20.00; Suit and Shirt $150.00; Funeral Home $525.00; and security overtime $1,380.00; for a total cost of $2,225.00.

Florida's Attorney General Recommendation

Florida Attorney General Bob Butterworth has made a recommendation on this issue. In a letter to the Speaker of the House of Representatives and the President of the Senate of the Florida Legislature dated March 26, 1997,

the Attorney General recommended the passage of legislation making "lethal injection an option in carrying out capital sentences lawfully imposed by the courts of this State." The Attorney General noted that the events related to the recent execution (Pedro Medina) would most likely cause condemned murderers to "again raise electrocution as an appellate issue as they seek to avoid their lawfully imposed sentences."

Florida Corrections Commission Recommendations

Based upon Florida's recent experiences in the Medina and Tafero executions utilizing the electric chair, and after an extensive review of execution methods utilized by other states, the Florida Corrections Commission recommends that Chapter 922, Florida Statutes, be amended to allow lethal injection as an alternative method of execution, in addition to electrocution, for those persons currently on death row.

Furthermore, for persons whose crimes are committed on or after the effective date of such legislation, lethal injection would be the only method of execution, thereby "phasing out" the use of the electric chair in Florida. Appendix J is a proposed bill incorporating these recommendations.

Bibliography

Bowers, William J. *Executions in America.* Lexington Books. 1974.

Dieter, Richard C. "Twenty Years of Capital Punishment: A Re-evaluation." Death Penalty Information Center, Washington, D.C.

Draper, Thomas, ed. *The Reference Shelf: Capital Punishment.* Volume 57, Number 2. The H.W. Wilson Company. New York. 1985

Drimmer, Frederick. *Until You Are Dead: The book of executions in America.* Citadel Press. 1990.

Gardner, Martin R. "Executions and Indignities – An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment." Ohio State Law Journal. Vol. 39:96. 1978.

Marquart, James W., Sheldon Ekland-Olson and Jonathan R. Sorensen. *The Rope, The Chair, and The Needle: Capital Punishment in Texas, 1923-1990.* University of Texas Press. 1994.

Snell, Tracy I. "Capital Punishment 1995." Bureau of Justice Statistics. U.S. Department of Justice. December 1996.

Zimring, Franklin E. and Gordon Hawkins. *Capital Punishment and the American Agenda.* Cambridge University Press. 1986.

THE FLORIDA CORRECTIONS COMMISSION

The Florida Corrections Commission was established in Chapter 93-404, Laws of Florida, during a special session of the Legislature in 1993. Its specific membership,

responsibilities and powers are currently defined in s. 20.315 (6), F. S. Members of the commission are unpaid volunteers representing all geographic areas of the State, and were selected for their knowledge in the areas of construction, health care, information technology, education, business, food service, law, and inmate rehabilitation and services. The original members were appointed to the Commission on February 8, 1995, by Governor Lawton Chiles and held their first meeting at the Department of Corrections on March 17, 1995.

While the role of the Commission is advisory and policy setting, it also provides an oversight function to the department. In the Commission's mission statement, it is noted that the purpose of the correctional system should be to promote the overall state goal of protecting the public. That goal is more easily attainable and cost-effective if state and local officials and private citizens are involved in the development and oversight of correctional programs and operations.

Included among the primary functions of the Corrections Commission are: to recommend major correctional policies and assure that approved policies and revisions are properly executed; review community-based intermediate sanctions and recommend intergovernmental approaches; evaluate the annual Department of Corrections' legislative budget request, the comprehensive correctional master plan and the tentative construction program; monitor the financial status of the department; and, regularly evaluate the efficiency, productivity, and management of the department.

Another principal assignment of the Corrections Commission is public education. The citizens of this state should be informed about the workings of the criminal justice system and strategies that reduce crime and promote public safety. It is the intention of the Corrections Commission to conduct a rigorous public education campaign on corrections and criminal justice issues.

THE FLORIDA CORRECTIONS COMMISSION MEMBERS

Edgar M. Dunn, Jr., who was elected Chair of the Commission, is an attorney. He is a member of the Board of Governors of The Florida Bar. In the past he has served the State of Florida as a State Senator for twelve years, as a member of the Florida Commission on Elections, as General Counsel to Governor Reubin O'D Askew, and as an Assistant State Attorney.

Katie C. Nichols, who was elected Vice Chair of the Commission, is self-employed and a philanthropist. She was appointed to the Florida Public Service Commission for two four-year terms, chairing that commission from 1987-88. Ms. Nichols has also been a member of the Florida Energy Council and the Governor's Commission on Grand Jury Reform. She currently serves as Chairman of the Board of Directors of the National Council on Crime and Delinquency.

Steven M. Florio is an adjunct professor at Florida International University in the School of Hospitality Management and past president of the Florida Chapter of the American Correctional Food Service Association. Mr. Florio served eight years as the food service coordinator for the Broward County Sheriffs Office.

The Honorable David F. Harvey is the sheriff of Wakulla County, having served since 1976. He is a past president of the Florida Sheriffs Association and Apalachee Human Services and was the Vice Chair of the Florida Council on Criminal Justice. Sheriff Harvey presently chairs the Wakulla County Juvenile Justice Council.

Alma B. Littles, M.D., is a physician specializing in Family Practice. Included among her many service activities are Secretary-Treasurer of the Florida Academy of Family Physicians, President of Capital Medical Society, Board of Directors of Big Bend Hospice, and Community Preceptor for the University of Florida College of Medicine. She has been in private practice for over seven years, and joined the faculty at the Tallahassee Memorial Regional Medical Center Family Practice Residency Program in November 1996.

Guy Revell, Jr., served as a Commissioner with the Florida Parole Commission for thirteen years. He has also held positions with the Governor's Office, the Department of Health and Rehabilitative Services, The Florida and National Councils on Crime and Delinquency and the American Correctional Association.

The Honorable Ray Sansom has been an Okaloosa County Commissioner since 1992. He is very active in

county government organizations, serving as the Chairman of the Florida Association of Counties' Public Safety Committee and as a member of the National Association of Counties' Public Safety, Corrections and Criminal Justice Committee.

Aaron Wallace is the President of Florida Teaching Profession-National Education Association. He is also a member of the Florida Education Practices Commission, having chaired the commission from 1993-94. Mr. Wallace retired after twenty years experience as a law enforcement specialist with the U.S. Air Force.

ACKNOWLEDGMENTS

The Corrections Commission wishes to thank the following people and organizations for their assistance and cooperation in the compilation of this report:

Secretary Harry K. Singletary, Jr. and the staff of the Department of Corrections Mr. Thomas Crapps, Assistant General Counsel, Office of the Governor Staff of Florida House of Representatives Committee on Corrections

The correctional agencies in the following states:

Alabama
Arkansas
Connecticut
Georgia
Illinois
Indiana
Kentucky
Louisiana
Missouri
Nebraska
New York
Ohio
Oklahoma
Pennsylvania
South Carolina
Tennessee
Texas
Virginia

Florida Corrections Commission Staff

John D. Fuller
Executive Director

Maxine J. McConnell
Assistant Executive Director

Robbie A. Bouplon
Management Analyst

James D. Fannin
Senior Management Analyst

Andra L. Norton
Executive Secretary

Visit the Commission's home page at
http://www.dos.state.fl.uslfgils/agencies/fcc

or

e-mail at fcorcom@mail.state.fl.us

Appendices

Appendix A

Report on findings and Recommendations Prepared following visit to Florida State Penitentiary at Starke, FL on April 8, 1997

Prepared by: Michael S. Morse
Date: April 10, 1997

Preface:

In 1990 I visited the Florida State Penitentiary at Starke, tested the electric chair and made recommendations. At that time, the equipment functioned as is expected and necessary to deliver a lethal shock without inflicting pain. At that visit recommendations were made and discussions were held regarding procedures and protocols.

Present Visit:

Present at this visitation was Mr. Jay Wiechert, Owner JAY WIECHERT MFG., Mr. Thomas Crapps, Assistant General Counsel, Governor's Legal Office, Mr. Ken Nunnelly, Office of the Attorney General, Mr. Ron McAndrew, Superintendent, Florida State Prison, Mr. Carl Hackle, Maintenance and Construction Superintendent, Florida State Prison, Mr. Jackie McNeill, Chief of Utilities, Florida State Prison. Also present were other DOC employees. Mr. Jim Luther of South Carolina DOC (retired) arrived later in the day.

NOTE: On the issues of Power Engineering, and power system design, I offer no comment and defer to Mr. Jay Wiechert, an expert in such areas.

Pre-Briefing:

Prior to conducting any tests, a meeting was held to discuss procedures and protocols followed by the DOC

during executions with particular emphasis placed on the procedures followed during the Medina execution. The chart recordings of voltage and current taken during the Medina execution were reviewed and discussed.

The following was noted:

1. An anomaly was noted in the trace of electrical current from the chartrecording made during the Medina execution. The current charted at the start of the execution was 4.5 amps).

2. It was noted that the procedure for preparing sponges for the headpiece included the use of dry sponge under which a wet sponge (soaked in .9% sodium chloride) was placed prior to placing the headpiece on the inmate. (Both experts present agreed that the use of a dry sponge was a practice which needed to be discontinued and also that the saline solution used should be replaced by a saturated saline solution.)

3. A discussion regarding corrosion of the screen in the headpiece yielded the conclusion that such corrosion was unlikely to have had an effect on the Medina execution. (This was verified by testing conducted with an equally corroded screen.)

Tests Conducted:

Mr. Wiechert and I conducted several tests on the electrocution equipment. Initially, tests were run to measure voltage and current produced by the system. A bucket filled with water into which electrodes were placed was used to provide an appropriate resistive load. The result of these initial tests were recorded by Mr. Wiechert.

The resistive load was calculated to be between 200 and 250 ohms which is in the range of typical values for a human as observed during an execution.

The system was then tested with the headpiece placed in series with the resistive load as would be typical during an electrocution.

In the first test, the individuals responsible for preparing the sponges and headpiece during the Medina execution were asked to follow the same procedures that they had followed and to affix the headpiece and combination of dry and soaked sponge to the top of a metal semisphere placed in series with the load. Less than one minute was allowed to elapse. The headpiece used was a backup headpiece with similar corrosion to that found on the headpiece used during the Medina execution. The system was energized and the result was that the dry sponge smoked and burnt as was observed during the first high voltage cycle of the Medina execution. This confirmed that the problem was the result of the use of a dry sponge in conjunction with a wet sponge. The situation is possibly exacerbated by the use of .9% saline. Localized blackening was observed on the metal semisphere indicating a current transfer area less than the area of the soaked sponge. This indicated a higher localized current density and burning of the sponge. The increased current density occurred as the result of limiting the area of electrical current transfer through the use of a dry sponge.

The test was repeated with the same headpiece but with only a single sponge which had been soaked in saturated saline solution. No burning or smoking was observed. It

is noted that in both tests the headpiece had the same level of corrosion.

Chart recordings were made at different points during the testing. At one point, the voltage trace of the chart recorder failed to operate properly.

Conclusions:

1. The execution machinery continues to perform at an appropriate current and voltage level to perform executions without causing pain or undue suffering.

2. The problems which arose during the Medina execution were the result of using a dry sponge between the wet sponge and the conductive screen in the headpiece. This dry sponge limited the area of conduction, increasing the current density, creating localized resistive heating at the top of the wet sponge and ultimately causing the sponge to ignite.

3. The situation described in (2) is probably exacerbated by the use of .9% saline.

4. On the assumption that electrocution at the level of several amperes causes instant depolarization of brain tissue, it is unlikely that Mr. Medina felt pain during his execution. The increased current density caused a higher level of localized tissue damage limited to the area of increased current density.

Recommendations:

1. It is noted that there was a significant change of personnel between my visit in 1990 and in 1997. It is not known at what point or by what process a decision was made to use a dry sponge or at what point or by what

process a decision was made to use .9% saline. Such procedural changes *must* be avoided in the future. *In the future it is recommended that a single sponge soaked in saturated saline be used in the headpiece.*

2. The problems observed in (1) could be avoided if detailed written procedures for each of the following are prepared and maintained on file:

- Tasks to be performed by each member of the execution team before, during, and after an execution.
- Procedure for choosing sponges, preparing sponges and for preparing saline solution.
- Procedures for preparing and testing each piece of execution equipment prior to an execution.
- Procedures and test schedule to be followed preceding an execution

2. It is recommended that all equipment be thoroughly inspected prior to each execution and any equipment showing indications of wear be serviced (or replaced) and then tested prior to use. *Under no circumstances should equipment be replaced with dissimilar or untested equipment. Such changes in procedure or equipment can lead to unanticipated results.*

3. It is recommended that the Chart recorder be serviced and calibrated on-site in preparation for each execution. Pens with adequate ink should be used. chart recordings should be made and dated at each test of the electrical system prior to an execution. Each chart recording should be marked indicating direction of trace chart speed (in inches per second), and vertical scale (amps or volts).

4. Headpiece, sponge, and legpiece should be tested in conjunction with the electrical equipment at least once prior to each execution. (The electrical machinery should be tested several times prior to each execution Testing schedule and procedure should be established by an expert such as Mr. Wiechert.)

5. Following an execution, it is recommended that the sponge used be placed in a sealed plastic bag and that it not be reused.

6. Following an execution, it is recommended that pictures be taken documenting the condition of the inmate while still in the chair. Photographs should include pictures of all components in contact with the inmate as well as points of contact on the inmate.

7. A witness should be present during each execution who is responsible for noting time and nature of any happening out of the ordinary.

8. The state should use a more standardized test load than is currently used to ensure consistency in testing of the system. Although the use of a bucket of water (with salt) is highly effective, there is enough variability to justify the expense of creating a test load. (See Mr. Wiechert for details.)

JAY WIECHERT MANUFACTURING
SPECIAL MACHINES - TOOLS - FIXTURES
INDUSTRIAL CONTROL SYSTEMS
719 SOUTH 10TH
FORT SMITH, ARKANSAS 72901

JAY WIECHERT, Owner
PROFESSIONAL ENGINEER

OFFICE 501-782-5667
FAX 501-782-2178
RES. 996-2554

EXAMINATION OF EXECUTION EQUIPMENT

April 8, 1997 Starke, FL

Meeting was arranged by Mr. Thomas Crapps (Governor's Legal Office) to determine cause of headgear fire during Medina execution and also to make improvements to equipment and procedures for future executions.

Dr. Michael Morse of San Diego was employed as consultant. He has electrical and medical background as well as experience with electric chairs in various states. I was employed because I design and build new electrocution equipment and have serviced older equipment.

Mr. Ron McAndrew (Superintendent Florida State. Prison) and his staff described in detail the Medina execution and the preparations preceding the execution. Body electrodes and sponges were examined. Chart paper showing voltage and current during Medina execution was examined.

After preliminary conference, we examined the execution equipment in the Death House. Generator was used to provide power for equipment (consistent with actual execution). Water bucket with two brass rods (resistive load) was used to simulate a human body (approximately 250

ohms). Headgear and sponges were tested using metal bowl (simulate scalp). Electrical instrument readings (voltage and current) were compared. Portable meters were provided by Dr. Morse and myself. Panel mounted voltmeter and ammeter was observed as well as chart recordings.

CONCLUSIONS CONCERNING MEDINA EXECUTION

Burning of headgear was caused by improper preparation of sponges. The small sponge attached to brass screen was dry. The separate larger sponge was soaked in .9% sodium chloride. During the execution, enough saline solution transferred from wet sponge to dry sponge to permit lethal current to flow. Due to small wetted area, the current density was great, thus elevating the temperature. Burning of sponge and headgear resulted.

Oxidation (discoloring) of brass screen, although undesirable, probably was not a factor.

Execution equipment, up to and including high voltage cables, performed properly.

RECOMMENDATIONS

1. Use single natural sea sponge larger than brass screen (brass must not touch skin). Soak in saturated salt water (not .9%). Saline solution is saturated if undissolved salt remains in bottom of container after stirring. Sponges must be wet. Very slight dripping of saline may result from tightening electrode straps (use towel). Repair leg electrodes (replace lead with brass).

2. Use of gel on skin is optional. Most executions have been performed without gel. If used successfully in past, don't change brands.

3. Fix and calibrate chart recorder. Erratic operation was observed during testing. Time scale (inches per second) must be measured and recorded on chart paper. Voltmeter and ammeter are working properly.

4. Written test procedure and execution procedure should be implemented. Duty assignments should be given to each team member (if someone is absent, his duties are spelled out for an alternate).

5. Electrical schmatic of equipment must be in hand during test and during execution. Electrician must be in attendance and be familiar with equipment. Purchase spare parts crucial to execution.

6. Test equipment quarterly. Test equipment one month prior to scheduled execution (allow time to order replacement parts if required). Use a repeatable resistive load for testing (measured voltage and current should remain the same year after year). I have loaned Superintendent Ron McAndrew a Test Unit for this purpose. Energize chart recorder during test, record date on chart paper and save.

7. At the conclusion of an execution, notes should be recorded from team members (debriefing). This will be valuable to team performing the next execution.

Note: Both reports recreated from copies of original documents.

Lethal injection
a better choice

Sanford Herald 4/10/97

If it ain't broke, don't fix it. The problem is, Old Sparky apparently is broken, but rather than fix it, perhaps the state should consider putting it into retirement.

Known as Old Sparky, Florida's electric chair appears to have a malfunction. It was noted for the second time during the March 25 execution of convicted killer Pedro Medina. When the switch was thrown, a short caused flames to shoot several inches out of the mask being worn by Medina.

Naturally, the prison medical specialist immediately announced that it did not cause any undue pain for Medina, who was supposed to be already dead by the time the flames were noticed.

This is the second time this has happened. The first time was in May of 1990, during the execution of another convicted murderer, Jesse Tafero.

Many decades ago, the common death penalty was hanging. Then, one by one, states eliminated that method in favor of the electric chair. It was more humane, they determined.

Recently, states have taken another step, and changed the execution process to the use of a lethal injection. Again, they say it is more humane.

Yes, without question, there are many people who would prefer the complete elimination of all types of death sentences. Their point of view, and well taken, is that no one should have the right to take another's life.

Unfortunately, there are some, such as Medina and Tafero, who apparently don't support this. They kill. Then, try to convince friends and family members of the persons who were murdered that the death penalty is wrong. Most of them demand an eye for an eye, and fully approve of the death sentence.

But whether or not to continue that form of punishment is a question which is not going to be answered easily or in the near future.

What must be determined however, is that the state should not become involved in repairing or replacing Old Sparky. Toss it out, put in a museum, or blow it to kingdom-come. But let's eliminate it, and if the death penalty must continue, use the lethal injection method as do the majority of other states.

EDITORIALS

[Plaintiff 4-2-97]

There's no reason to delay executions

Four medical examiners have concluded that Pedro Medina felt no extraordinary pain when he was executed in Florida's electric chair last week. Two of those experts conducted their examinations on behalf of Medina's lawyers.

Medina's death became an issue because during the course of the electrocution a foot-long blue-and-orange flame shot up for six to 10 seconds from the mask he was

wearing, sending smoke into the execution chamber and the visitor seating area.

A LAWYER FOR the state office that represents death row inmates has asked Gov. Lawton Chiles to halt two executions scheduled for April and to stop signing death warrants.

There is no reason to do this. The pathologists agree that Medina did not suffer any more than other executed inmates. Apparently what caused the flame was a corroded copper screen in the headpiece.

Carrying out an execution or being an official witness at one is, by definition, a grisly duty. Dying in the electric chair may be near-instantaneous, with consciousness wiped out in a flash, but it is still a horrible way to end a life.

Well, it is designed to be repellent. That's no accident. It need not be tidied up for the benefit of those in the visitors' seats.

There is no reason to abandon the electric chair in favor of lethal injection simply because of what happened to Pedro Medina. Executing a murderer is not like having a veterinarian put an aging, sick pet out of its misery. It is not even like the suicides that Jack Kevorkian has assisted. It is society's outraged response to dreadful, heinous acts.

There are two executions planned for this month. Consider the cases:

■ April 15, Leo Alexander Jones is set to be executed. He was a part-time pool hall worker in Jacksonville who became angry in 1981 about being charged with resisting

arrest for a traffic infraction, and he vowed to "kill a pig." A week later, Jones was lying in wait when Officer Thomas J. Szafranski came down the street in his squad car, responding to a domestic disturbance. Jones shot him dead with a 30-30 Winchester rifle. Police found the gun under Jones' bed.

■ April 29, Gerald Eugene Stano is scheduled to die in the electric chair. Stano has confessed to 41 killings. He was sentenced to death in 1983 for the murders of three Volusia County women. He has also been sentenced to life in prison for six killings, dating back to the 1970s. Described as utterly without a conscience and completely remorseless. Stano has admitted killing females who ranged in age from 12 to the mid-50s.

ONE LAWYER representing Stano argued in 1986 that he should be spared in order to be studied. "We need to know more about why serial killers like Mr. Stano do what they do," Sam Bardwell told the governor and clemency board.

Back in 1983, the parents of one murder victim spoke eloquently about justice for Gerald Stano: "Life in prison is not sufficient punishment. Gerald Stano should be sentenced to death. He could then experience the fear and helplessness that all his victims felt when he chose to end their lives."

EDITORIAL
Justice, not torture

Ocala Star Banner 3/27/97

For almost three-quarters of a century, the method of execution in Florida has been the electric chair, but after two mishaps – one in 1990, the other on Tuesday – it is imperative that the state enter the next millennium with a more modern, humane method.

"Old Sparky," the nickname for Florida's electric chair, has malfunctioned twice in seven years. Instead of routinely electrocuting its occupant, the 74-year-old chair has also set fire to two men being put to death.

The results have been the same – death. But the means are once again in question. When foot long flames shoot from an inmate's head during an execution, questions rightly surface as to whether the death was torturous. Officials aren't sure whether 39-year-old murderer Pedro Medina suffered additional pain.

No doubt it was a gruesome sight for witnesses. There will almost certainly be calls to change the system. We urge legislators to act responsibly.

It's time for Florida to implement a more humane method of execution.

No one can be certain how much pain is felt by those who experience the death penalty. After all, none of those who have paid the ultimate price for their crimes have been able to tell of it.

There are theories that the most painless execution is by way of the guillotine. But the thought of heads literally rolling in Florida is out of the question. Over history, civilized societies have steadily moved toward less barbaric ways of ridding the population of those deemed undeserving of further life. People today shudder at the thought that crucifixion was once an accepted execution method. Beheading people via axe or guillotine, are likewise viewed as barbaric. Firing squads are pretty much outmoded, as are hangings.

A number of states have switched to lethal injection execution. But Tuesday's reaction by legislators to the fire at Florida State Prison in Starke suggests that most are satisfied with status quo. Death by electrocution, we believe, will someday be deemed just as barbaric as earlier methods.

On Tuesday, Attorney General Bob Butterworth warned, "People who wish to commit murder, they better not do it in the state of Florida because we may have a problem with our electric chair."

We deplore Butterworth's insensitivity. Also, the attorney general does not seem to understand that the death penalty does not deter murder. The death penalty is primarily a form of retribution and rendering justice. Those who have witnessed executions are some of the most vehement opponents of the death penalty. But we submit that were those same people to witness the torture and murder of helpless victims, the death penalty might not seem severe enough.

Though some people believe [Illegible] living on death row for years, generally exceed that of sentencing a murderer to life without chance of parole.

According to the Department of Corrections, the average length of stay on death row prior to execution is 10.2 years.

But there are some inmates who stay much longer. A local example is Ian Lightbourne who was convicted of raping and murdering Nancy O'Farrel in Ocala in January 1981. Lightbourne was tried and found guilty on April 25, 1981. His trial and conviction were swift, but his execution has been stayed several times. He continues to live on death row 16 years later.

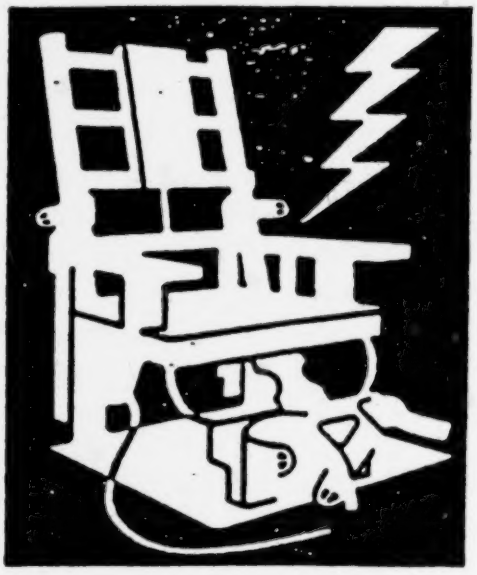
Those who have been sentenced to death (381 inmates are now on death row) have been convicted of committing premeditated murders. But Florida needn't stoop to the level of brutality carried out by murderers. This newspaper supports the death penalty, but it is time to implement a more humane method of execution.

Old Sparky is legal

Regardless whether condemned killer Leo Jones was given a fair hearing, there is no rational basis for his argument that Florida's method of execution is unconstitutional.

It is true, as Jones notes, that the electric chair's headpiece caught fire March 25, causing flames to shoot

from under the mask of Pedro Medina. But the problem has been fixed – and even if it had not, that in itself would not violate the Eighth Amendment ban on "cruel and unusual punishments."



Jones' lawyer, based on the accounts of non-medical witnesses, says Medina was still breathing after the voltage was sent through his body and therefore he probably suffered. But the attending physician testified he died instantly.

After a weeklong hearing, Circuit Judge A.C. Soud of Jacksonville ruled the Jones execution could go forward.

Jones' lawyer, however, complained to the Florida Supreme Court that he had been given voltage charts too late to be of any use and that Soud improperly had refused to grant a delay so his expert witnesses could appear.

Prosecutors insist the attorney should have requested the material sooner – and Soud acted reasonably in relying on the testimony of a medical expert who was there, rather than theories based on the impressions of lay people.

It will take legal experts to determine whether the hearing was fair. We certainly are not capable of doing that.

But it does not seem unreasonable to rely on the opinion of the attending physician when drawing a medical conclusion. Even if the condemned man does experience some pain in his execution, pain is a natural part of dying. It is the body's way of telling a person that something is wrong.

More than 100 years of Supreme Court precedent is on the state's side.

In the 1879 Wilkerson case, the high court said only torture and other "atrocities" – such as burning at the stake, crucifixion or breaking on the wheel – would be cruel and unusual.

In the 1890 Kemmler case, it clearly said electrocution was constitutional.

It is also said hanging was permissible in that decision. When done properly, hanging is a quick and painless way to die. But when botched, death can be considerably slower and far more painful than an electrocution.

The court further clarified the Eighth Amendment in the 1910 Weems case, saying it was unduly cruel to chain

somebody in prison from 12 to 20 years for merely entering a false statement in the public record. It further explained, 67 years later in the Coker and Eberheart cases, that a sentence had to be "grossly disproportionate to the offense" to be unconstitutional.

Jones was convicted of gunning down a local police officer in a 1981 ambush. The death penalty does not seem excessive for intentionally taking another person's life, even if there is some evidence that the perpetrator – like his victim – might conceivably feel some pain during his final moments.

BRADENTON HERALD
BRADENTON
DAILY – 54,000
APRIL 5, 1997

Our viewpoint

Wasting organs

We have an addendum to Friday's editorial advocating replacing Florida's electric chair with lethal injection to carry out the death penalty.

A letter from attorney Ellis Rubin reminded us of a point we missed in our argument. As Rubin wrote:

"If there are to be executions, let the suggested method and results be ratified as the new, civilized approach to the death penalty. Death by lethal injection is

the only way that vital organs can be preserved and made ready for transplantation."

In his letter Rubin cited the case of Daniel Faries, sentenced to death by the Dade Circuit Court. At the request of Faries, in 1992, Rubin asked the court to execute Faries by lethal injection so that when he gave up his life his organs could be passed on to others to compensate for the death he caused.

Had the court agreed, up to five persons could have been recipients of Faries' heart, kidneys, liver, lungs, pancreas, corneas and other transplantable organs.

The court refused to grant Faries' request. He was killed by the state, and so were the opportunities for new lives that he could have been passed on to very sick people who have no other hope than an organ transplant.

What a waste. Not only were Faries' organs needlessly destroyed, his compassionate wish to compensate for his terrible crime was denied by the state.

Yes, organ harvesting could create opportunities for massive abuse of prisoners' rights. No way should the state be given an opportunity to turn death row into a reservoir of organs for harvest.

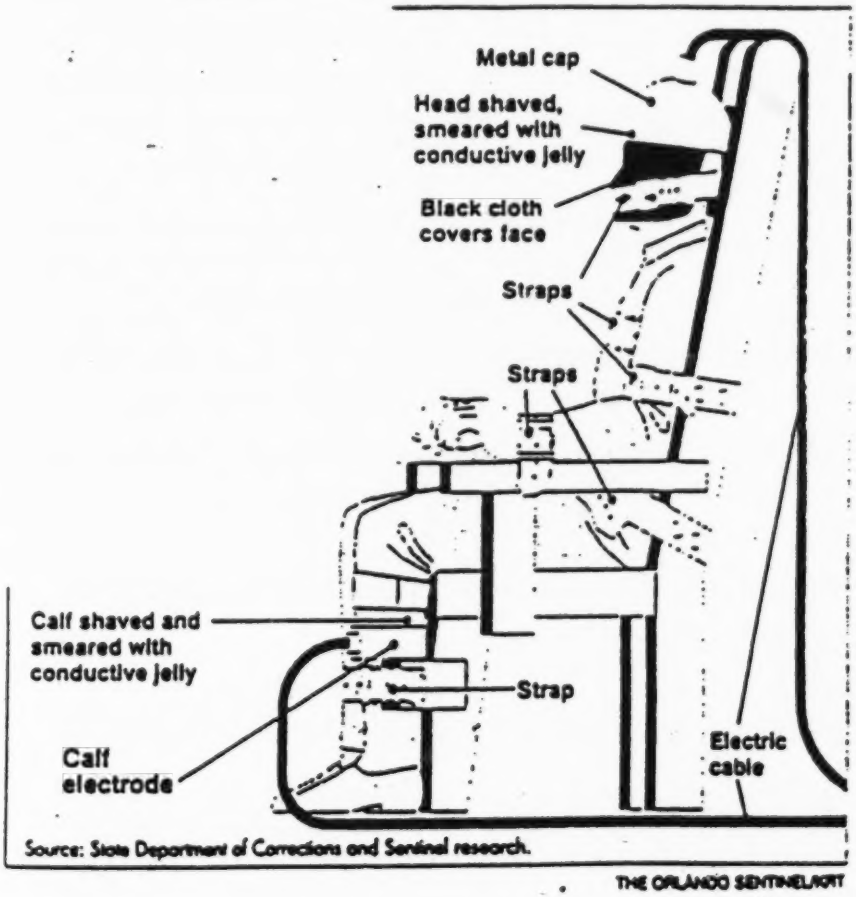
But there are ways to safeguard against abuse. The key is to keep the decisions to become a donor voluntary, without any coercion. The wish to become a donor must be seen as an opportunity for restitution the convict is free to accept or reject.

If we must put people to death for their crimes, let us know [sic] take away the last opportunity they have to do good for society.

Giving them this option could mean their salvation.

Appendix C

Diagram of Florida's Electric Chair



Appendix D

Courts and Cases Upholding Lethal Injection

Military Court Marshals	*Hunt v. Nuth,* 57 F.3d 1327 (4th Cir. 1995)
All Federal Prisoners	*U.S. v. Chandler,* 950 F. Supp. 1545 (N.D. Ala. 1996)
	Fed. Def. convicted as drug king-pin & sentenced to die. Ct. Found Dept. of Justice Regs. no 8th A violation.
	The only court that has examined a similar challenge to execution by lethal injection has rejected it. See:
5th Cir.	Wools v. McCotter, 798 F.2d 695, 697-98 (5th Cir. 1986) (federal prisoners)
(Texas)	*Kelly v. Lynaugh,* 862 F.2d 1126 (5th Cir. 1988) (state prisoners)
3d Cir. (Penn.)	*Zettlemoyer v. Horn,* 53 F.3d 24 (3rd Cir. 1995)
4th Cir. (Maryland)	*Hunt v. Nuth,* 57 F.3d 1327 (4th cir. 1995)
10th Cir. (Utah)	*Andrews v. Shulsen,* 802 F2d 1256 (10th Cir. 1986)
9th Cir. (Washington)	*Rupe v. Wood,* 93 F.3d 1434 (9th Cir. 1995)

James Blodgett gained hundred of pounds to weigh 400+. Statute gave him choice between hanging and lethal injection. He chose hanging and then challenged its constitutionality. The 9th court had stayed his execution until he lost weight but also wouldn't let authorities limit his canteen food (how he gained the weight). But on 6/6/96, the Wash. leg. changed statute to say there was "a presumption in favor of lethal injection" so that if hanging were declared 8th A violation in one case then that Defendant would have to have lethal injection. Said lethal injection CON.

9th Cir. (Arizona)	*State v. Hinchey,* 890 P.2d 602, 610, cert. denied, ___ U.S. ___, 116 s.ct. 528, 133 L.Ed.2d 434 (1995)
California	*Fierro v. Gomez,* 865 F.Supp. 1387 (ND Cal. 1994) Numerous cases in dicta in comparison to lethal gas.
Connecticut	*State v. Webb,* 680 A.2d 147 (Ct. 1996)
Delaware	*Dawson v. State,* 673 A.2d 1186 (Del. 1996)
Idaho	*Sivak v. State,* 731 P.2d 192 (Idaho 1987)
Illinois	*Holman v. Gilmore,* 1997 WL 89126 (N.D. Ill. 1997)
Indiana	*Harrison v. State,* 644 NE2d 1243 (Ind. 1995)

By dicta said lethal injection okay. Prisoner attempted to argue electrocution

	8th A violation, cited Brennan's dissent in *Glass v. Louisiana*, 471 U.S. 1080, 105 S.Ct. 2159, 85 L.Ed.2d 514 (1985) "in an age which offers the alternative of lethal injection, the barbaric killing of people in 1993 by putting them in an antiquated electrical device should be considered no less cruel and unusual than burning at the stake . . . was considered to be in 1890."
Louisiana	*Thompson v. Gain*, 1997 WL 79295 (E.D.La.)
Mississippi	*Booker v. Murphy*, 1997 WL 6095 (S.D. Miss. 1997) *Carr v. State*, 655 So.2d 824 (Miss. 1995) Three prisoners sentenced to die by lethal gas before legislature changed method to lethal injection. They challenged right to lethal injection. Ct. remanded (Also, prisoners were trying to sue for damages of being left on death row with threat of gas but court threw out claim under qualified immunity.)
Montana	*State v. Gollehon*, 864 P.2d 249 (Mont. 1993)
Oklahoma	*Romano v. State*, 917 P.2d 12 (Ok. 1996)
South Dakota	*State v. Moeller*, 548 N.W.2d 465 (S.D. 1996)
Texas	*Ex parte Granviel*, 561 S.W.2d 503, 514 (Tex. 1978)
Tennessee	*State v. Barber*, 753 S.W. 2d 659, 670 (Tenn. 1988)

	In dicta, said yes. Justice Fones for court said "the validity and humanity of that complaint {that electrocution is cruel} should be addressed to the legislature. This Court's authority over punishment for crime ends with adjudication of constitutionality."
Virginia	*Mickens v. Virginia,* 478 S.E.2d 302 (Va. 1996)
	Although said that 8th A issue was procedurally barred, did say that there was no merit to claim because all cases have upheld its CON.
Wyoming	*Hopkinson v. State,* 798 P.2d 1186 (Wy. 1990)
	Other Relevant Cases
Supreme Court	*Skillern v. Procunier,* denied cert., 469 U.S. 1182, 105 S.Ct. 945, 83 L.Ed.2d 956 (1985); 8th A only claim and court refused to review.
Supreme Court	*Gray v. Lucus,* 463 U.S. 1237, 104 S.Ct. 211 (1983)
	Declared gas unconstitutional and gave criteria for 8th A punishment violation which is standard all prisoners must meet.
11th Circuit	See *Spenkelink,* 578 F.2d at 616 (11th Cir.)
	He was trying to claim that chair was 8th A uncon, and said that since other states turning to lethal injection, it was particularly cruel and unusual. In dicta the 11th Cir. made the presumption that lethal injection was CON when stating

that even though it was used in other states, no 8th A violation for chair.

Relied on Kimmler, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890) (a hanging case with same issue about less cruel alternatives in other states)

Source: Office of the Governor

Methods of Execution by State

Lethal Injection		Electrocution	Lethal Gas	Hanging	Firing Squad
Arizona †▲	New Hampshire †	Alabama	Arizona ▲	Delaware ▲	Idaho[1]
Arkansas †▲	New Jersey	Arkansas ▲	Maryland[2]	New Hampshire ▲▲▲	Oklahoma †††
California	New Mexico	Florida	Mississippi ▲▲	Washington[3]	Utah[3]
Colorado	New York	Georgia	Missouri[1]		
Connecticut	North Carolina[3]	Kentucky	North Carolina[3] †		
Delaware †▲	Ohio[3]	Nebraska	Wyoming ††		
Idaho[1]†	Oklahoma †	Ohio[3] †			
Illinois	Oregon	Oklahoma ††			
Indiana	Pennsylvania	South Carolina[3] †			
Kansas	South Carolina[3] †	Tennessee			
Louisiana	South Dakota	Virginia[3]			
Maryland †	Texas				
Mississippi †	Utah[3]				
Missouri[1]†	Virginia[3] †				
Montana	Washington[3] †				
Nevada	Wyoming †				

States with No Capital Punishment

Alaska
Hawaii
Iowa
Maine
Massachusetts
Michigan
Minnesota
North Dakota
Rhode Island
Vermont
West Virginia
Washington, D.C.
Wisconsin

† Primary method of execution

†† Authorized if the primary method is held unconstitutional

††† Authorized if the secondary method is held unconstitutional

▲ Authorized for those inmates sentenced before the date established for the primary method to select between the two methods

▲▲ Authorized for those inmates sentenced before the date established for the primary method

▲▲▲ Authorized only if primary method can not be used

1 DC director chooses method of execution

2 Authorizes lethal gas for only one (1) inmate

3 Inmate chooses method of execution

☐ Authorizes two or more methods of execution

Prepared by Staff of the Florida House of Representatives Based on a telephone survey conducted April 1997, and *Capital Punishment 1995*, U.S. Department of Justice

BEST AVAILABLE COPY

Appendix F

Prisoners Under Sentence of Death

State	Bureau of Justice Statistics As of 12/31/95		NAACP Legal Defense Fund As of 7/31/96	
	Number	%	Number	%
Federal	8	0.26%	10	0.32%
US Military	N/A	N/A	9	0.29%
California	420	13.75%	444	14.07%
Texas	404	13.23%	394	12.48%
Florida	362	11.85%	349	11.06%
Pennsylvania	196	6.42%	201	6.37%
Ohio	155	5.08%	150	4.75%
Illinois	154	5.04%	172	5.45%
Alabama	143	4.68%	151	4.78%
North Carolina	139	4.55%	154	4.88%
Oklahoma	129	4.22%	124	3.93%
Arizona	117	3.83%	122	3.87%
Georgia	98	3.21%	108	3.42%
Tennessee	96	3.14%	102	3.23%
Missouri	92	3.01%	94	2.98%
Nevada	75	2.46%	81	2.57%
South Carolina	67	2.19%	71	2.25%
Louisiana	57	1.87%	58	1.84%
Virginia	56	1.83%	53	1.68%
Mississippi	49	1.60%	53	1.68%
Indiana	46	1.51%	49	1.55%
Arkansas	38	1.24%	42	1.33%
Kentucky	28	0.92%	28	0.89%
Oregon	20	0.65%	22	0.70%
Idaho	19	0.62%	19	0.60%
Delaware	14	0.46%	11	0.35%
Maryland	13	0.43%	17	0.54%
Nebraska	10	0.33%	9	0.29%
New Jersey	10	0.33%	16	0.51%
Utah	10	0.33%	10	0.32%
Washington	9	0.29%	13	0.41%
Montana	6	0.20%	6	0.19%
Connecticut	5	0.16%	5	0.16%
Colorado	4	0.13%	4	0.13%
New Mexico	3	0.10%	3	0.10%
South Dakota	2	0.07%	2	0.06%
Kansas	0	0.00%	0	0.00%
New Hampshire	0	0.00%	0	0.00%
Wyoming	0	0.00%	0	0.00%
Total	**3,054**	**100.00%**	**3,156**	**100.00%**

Appendix G

Executions in the U.S.: 1977-Present

State	Method																				Total
	Lethal Injection				Electrocution				Gas Chamber				Firing Squad				Hanging				
	77-90	91-95	1996	1997	77-90	91-95	1996	1997	77-90	91-95	1996	1997	77-90	91-95	1996	1997	77-90	91-95	1996	1997	
AL					8	4	1	3													16
AR		9	1	3	2																15
AZ		3	2	1						1											7
CA		1	2							1											4
DE		5	2																1		8
FL					25	11	2	1													39
GA					14	6	2														22
ID		1																			1
IL	1	6	1																		8
IN			1		2	1															4
LA		2	1	1	19	1															24
MD		1																			1
MO	5	12	6	1																	24
MS									4												4
MT		1																			1
NC	1	4							2	1											8
NE						1	1														2
NV	4		1		1																6
OK	1	5	2	1																	9
OR			1	1																	2
PA		2																			2
SC		1	5	1	3	1	1														12
TX	37	67	3	21																	128
UT	2	1											1		1						5
VA		5	8	2	11	13															39
WA																		2			2
WY		1																			1
Subtotal	51	127	36	32	85	38	7	4	6	3	0	0	1	0	1	0	0	2	1	0	394
Subtotal	246				134				9				2				3				394

Percentage by Method
1977-1997

Lethal Injection	62.44%
Electrocution	34.01%
Gas Chamber	2.28%
Firing Squad	0.51%
Hanging	0.76%
Total	100.00%

Percentage by Method
1977-1990

Lethal Injection	35.66%
Electrocution	59.44%
Gas Chamber	4.20%
Firing Squad	0.70%
Hanging	0.00%
Total	100.00%

Percentage by Method
1991-1997

Lethal Injection	77.69%
Electrocution	19.52%
Gas Chamber	1.20%
Firing Squad	0.40%
Hanging	1.20%
Total	100.00%

Source: Compiled from "Executions in the U.S. 1976-1997," Death Penalty Information Center as of 6/15/97

Appendix H

Death Penalty Information Sources On the Internet

National Sources

Capital Punishment 1995, U.S. Department of Justice (link to Adobe Acrobat file): http://www.ncjrs.org/corrdocs.htm

Court TV Library: The Death Penalty: http://www.courttv.com/library/capita/

Death Penalty Information & Resources; Anti-Capitol Punishment Resources from the ASC's (American Society of Criminology) Critical Criminology Division: http://sun.soci.niu.edu/~critcrim/dp/dp.html

Death Penalty Information Center, Washington, D.C.: http://www.essential.org/dpic/

Death Penalty News and Updates: http://www.smu.edu/~deathpen/

Friends for Life: http//www.friends-for-life.demon.co.uk/

The Pro-Death Penalty Page: http://www.geocities.com/CapitolHill/8169/

Florida Sources

Attorney General's letter to House and Senate leaders supporting lethal injection as a method of execution, March 26, 1997: http://legal.firn.edu/justice/lethal.htm

Death Penalty Page sponsored by the Florida State University College of Law: http://law.fsu.edu/lawtech/deathpen/deathpen.html

Florida Death Row Roster:

http://www.dos.state.fl.us/corrections/security/drroster.html

Florida Department of Corrections Death Row Fact Sheet: http://www.dos.state.fl.us/corrections/security/deathrow.html

Florida Execution List: http://www.dos.state.fl.us/corrections/security/execlist.html

Florida's Women on Death Row: http://www.dos.state.fl.us/corrections/security/womendr.html

---

Appendix I

Post-Furman Botched Executions

by Michael L. Radelet
updated by the Death Penalty Information Center

1. April 22, 1983. Alabama. John Evans. After the first jolt of electricity, sparks and flames erupted from the electrode attached to his leg. The electrode then burst from the strap holding it in place and caught on fire. Smoke and sparks came out from under the hood. Two physicians entered the chamber and found a heartbeat. The electrode was reattached to his leg. More smoke and burning flesh. Again doctors found a heartbeat. Ignoring

the pleas of Evan's lawyer, Russ Canan (202-292-7676), a third jolt was applied. The execution took 14 minutes and left Evan's body charred and smoldering. Canan describes the experience in M.L. Radelet (Ed.), Facing the Death Penalty: Essays on a Cruel and Unusual Punishment (1989). (See also Glass v. Louisiana, 471 U.S. 1080 (1985)).

2. Sept. 2, 1983. Mississippi. Jimmy Lee Gray. Officials had to clear the room eight minutes after the gas was released when Gray's desperate gasps for air repulsed witnesses. His attorney, Dennis Balske of Montgomery, Alabama, criticized state officials for clearing the room when the inmate was still alive. Says David Bruck, "Jimmy Lee Gray died banging his head against a steel pole in the gas chamber while reporters counted his moans (eleven, according to the Associated Press)" (Bruck, New Republic, Dec. 12, 1983 at 24-25).

3. December 12, 1984. Georgia. Alpha Otis Stephens. After the first jolt of electricity failed to kill him, Stephens struggled for eight minutes before a second charge finished the job. The first jolt took two minutes, and there was a six minute pause so his body could cool before physicians could examine him (and declare that another jolt was needed.) During that six-minute interval, Stephens took 23 breaths.

4. March 13, 1985. Texas. Stephen Peter Morin. Had to probe both arms and legs with needles for 45 minutes before they found the vein.

5. October 16, 1985. Indiana. William E. Vandiver. He was still breathing after the first administration of 2,300 volts, and the current had to be applied three more times

before he died. Vandiver's attorney, Herbert Shaps, witnessed the killing and said it was outrageous. The Department of Corrections admitted the execution "did not go according to plan." The physician who pronounced death said, "This is very rare."

6. August 20, 1986. Texas. Randy Woolls. A drug addict, Woolls had to help the executioner technicians find a good vein for the execution.

7. June 24, 1987. Texas. Elliott Johnson. It took 35 minutes to insert a catheter into his vein.

8. December 13, 1988. Texas. Raymond Landry. Pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the killing, the syringe came out of Landry's vein, spraying the deadly chemicals across the room toward the witnesses. The execution team had to reinsert the catheter into the vein. The curtain was drawn for 14 minutes so witnesses could not see the intermission.

9. May 24, 1989. Texas. Stephen McCoy. Had such a violent physical reaction to the drugs (heaving chest, gasping, choking, ect. [sic]) that one of the witnesses (male) fainted, crashing into and knocking over another witness. Houston attorney Karen Zellars, who represented McCoy and witnessed the execution, thought that the fainting would catalyze a chain reaction. The Texas Attorney General admitted the inmate "seemed to have a somewhat stronger reaction," adding, "The drugs might have been administered in a heavier dose or more rapidly."

10. July 14, 1989. Alabama. Horce F. Dunkins. It took two jolts (nine minutes apart) to kill this mentally retarded inmate. The foul-up was caused by "human error:" faulty cable hookups. As a result there was not enough current to cause death. His attorney was Steve Ellis of Philadelphia. Death was pronounced 19 minutes after the first jolt.

11. May 4, 1990. Florida. Jesse Joseph Tafero. When the state replaced a "natural" sponge with a synthetic sponge in the headpiece of the execution apparatus, six-inch flames erupted, and three jolts of power were required to stop Tafero's breathing. Support for the state's faulty sponge theory was generated by sticking a part of it into a "common household toaster" and noting that it smoldered and caught fire. Extensive investigation by the office of the Capital Collateral Investigator in Tallahassee questioned this theory as other states have used synthetic sponges with no problems.

12. October 17, 1990. Virginia. Wilbert Lee Evens. During the electrocution, blood spewed from the right side of the mask on Evans' face, drenching Evens' shirt with blood. Evens' continued to moan after the first jolt of electricity was applied. The autopsy concluded that the blood resulted from high blood pressure brought on by the electrocution.

13. August 22, 1991. Virginia. Derick Lynn Peterson. After a physician determined that the first cycle of electricity had failed to kill Peterson, a second cycle was required. It was the second time this electrical equipment had been used since Virginia's electric chair had been moved to Greenville from the state's old death house in

Richmond. In the aftermath of the execution, prison officials announced that in the future they would routinely administer two cycles before checking for a heart beat.

14. January 24, 1992. Arkansas. Rickey Ray Rector. It took medical staff more than 50 minutes to find a suitable vein in Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal, Rector (who suffered serious brain damage from a lobotomy) tried to help the medical personal [sic] find a vein. The administrator of the State's Department of Corrections medical programs said (paraphrased by a newspaper reporter) "the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein." The administrator said "that may have contributed to his occasional outburst."

15. March 10, 1992. Oklahoma. Robyn Lee Parks. Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck, and abdomen began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag. Death came eleven minutes after the drugs were administered. Said Tulsa World reporter Wayne Greene, "the death looked scary and ugly."

16. April 23, 1992. Texas. Billy Wayne White. It took 47 minutes for authorities to find a suitable vein, and White eventually had to help them.

17. May 7, 1992. Texas. Justin Lee May. May had an unusually violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the Item (Huntsville),

May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze . . . " Associated Press reporter Michael Graczyk wrote," He went into coughing spasms, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back if he had not been belted down. After he stopped breathing his eyes and mouth remained open."

18. May 10, 1994. Illinois. John Wayne Gacy. After the execution began, one of the three lethal drugs clogged the tube leading to Gacy's arm, and therefore stopped flowing. Blinds, covering the window through which witnesses observes the execution, were then drawn. The clogged tube was replaced with a new one, the blinds were opened, and the execution process resumed. Anethesiologists blamed the problem on the inexperience of the prison officials who were conducting the execution, saying that proper procedures taught in "IV 101" would have prevented the error.

19. May 3, 1995. Missouri. Emmitt Foster. Foster was not pronounced dead until 30 minutes after the executioners began the flow of the death chemicals into his arms. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit the witnesses from viewing the scene: they were not reopened until three minutes after death was pronounced. According to the coroner, who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the gurney: it was so tight that the flow of chemicals into his veins was restricted. It was several minutes after a prison worker finally loosened the strap that death was pronounced. The coroner entered the death chamber twenty

minutes after the execution began, noticed the problem, and told the officials to loosen the strap so that the execution could proceed.

20. July 18, 1996. Indiana. Tommie Smith. Smith was not pronounced dead until an hour and 20 minutes after the execution team began to administer the lethal combination of intravenous drugs. Prison officials said the team could not find a vein in Smith's arm and had to insert an angio-catheter into his heart, a procedure that took 35 minutes. According to authorities, Smith remained conscious during that procedure.

21. March 25, 1997. Florida. Pedro Medina. With the first jolt of electricity, blue and orange flames sparked from the mask covering Medina's face. Flames up to a foot long shot out from the right side of Medina's head for 6-10 seconds. The execution chamber clouded with smoke, and the smell of burnt flesh filled the witness room.

22. May 8, 1997. Oklahoma. Scott Carpenter. Two minutes after the lethal chemicals began flowing into the body of Scott Carpenter at 12:11 a.m., he began to make noises, his stomach and chest began pulsing, and his jaw clenched. In total, his body mad [sic] 18 violent convulsions, followed by 8 milder ones. His face, which first turned a yellowish gray, had turned a deep purple and gray by 12:20 a.m. He was officially pronounced dead at 12:22 a.m.

Return to homepage

Appendix J

Proposed Bill authorizing Lethal Injection

A bill to be entitled

An act relating to capital punishment; amending s. 922.10, F.S.; providing that a death sentence may be executed by injection of a lethal substance at the option of the convicted person sentenced for crime committed before the effective date; requiring execution of death sentence by lethal injection for persons sentenced for crimes committed on or after the effective date; providing that the administration of a lethal substance does not constitute the practice of medicine; authorizing pharmacists to dispense drugs without prescription; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 922.10, Florida States, is amended to read:

922.10 Execution of death sentence. –

(1)(a) For persons sentenced to death for crimes committed on or after October 1, 1997, a ~~A~~ death sentence shall be executed by lethal injection ~~electrocution.~~

(b) As an alternative method for persons sentenced to death by electrocution for crimes committed prior to October 1, 1997, a death sentence may, at the option of the convicted person, be executed by injection of a lethal substance into the person. The person must communicate his or her decision to the superintendent of the state prison at least 1 week before the date set for the execution.

(2). The lethal substance utilized in executing a death sentence pursuant to subsection (1) shall be specified by rule of the Department of Corrections. If lethal injection is determined to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a death sentence shall be executed by electrocution.

(3) The superintendent ~~warden~~ of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution.

Section 2. The administration of a lethal substance when executing a death sentence which is being carried out by a lethal injection does not constitute the practice of medicine. Any pharmacist may dispense drugs to the superintendent of the state prison or his designee, without prescription, to execute a sentence of death by lethal injection, and the dispensing to the superintendent of the state prison or his designee of such drugs is not grounds for disciplinary action against the pharmacist by any administrative board or agency.

Section 3. The Department of Corrections shall adopt rules with respect to the communication by a person sentenced to death of his or her decision as to the method of execution and with respect to his or her decision to change that decision at any time before the date upon which the decision may not be changed.

Section 4. This act shall take effect on October 1, 1997.

Supreme Court of the United States

No. 99-6723

Anthony Braden Bryan

v.

Michael W. Moore, Secretary,
Florida Department of Corrections

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Florida.

UPON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 26, 1999

DEC 17 1999

FILED
DEC 17 1999
CLERK

No. 99-6723

In The

Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

versus

MICHAEL MOORE, Secretary
Florida Department of Corrections,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER ANTHONY BRADEN BRYAN

DAVID WEISSBRODT
Fredrikson & Byron
Professor of Law
University of Minnesota
Law School
285 Law Center
229-19th Avenue South
Minneapolis, MN 55455
(612) 625-1000
Legal Counsel for
Amicus Curiae Minnesota
Advocates for Human Rights

CONSTANCE DE LA VEGA
Counsel of Record
Professor of Law
University of
San Francisco, Law Clinic
2130 Fulton Street
San Francisco, CA 94117
(415) 422-6752
Attorney for Amicus Curiae
Human Rights Advocates

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

STATEMENT OF FACTS 3

ARGUMENT 6

I. THE UNITED STATES TREATY OBLIGATIONS SUPPORT PETITIONER'S CONTENTION THAT THE ELECTRIC CHAIR VIOLATES THE EIGHTH AMENDMENT 6

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Buenoano v. State, 565 So. 2d 309 (1990) 3

Butt v. State of Calif., 4 Cal. 4th 668, 842 P. 2d 1240, 15 Cal. Rptr. 2d 480 (1992) 1

Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 1

Coalition for Economic Equity v. Wilson, 110 F. 3d 1431 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997) 1

Fierra v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994) 11

Hilao v. Estate of Marcos, 103 F. 3d 789 (9th Cir. 1996) 1

Jones v. Florida, 701 So. 2d 76 (1997) 4

La Grande v. Stewart, 173 F. 3d 1144 (9th Cir. 1999) 11

Provenzano v. Moore, No. 95,973, slip op. (Appendix B to the petition for a writ of certiorari).....3, 5

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. VI, § 2, cl.2 7

U.S. CONST. amend. VIII 8, 9, 11, 12

STATUTES

136 Cong. Rec. S17486-92 (daily ed., Oct. 27, 1990) 6

138 Cong. Rec. S4781-84 (daily ed., April 2, 1992).. 6, 7, 9

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Charles Chitat Ng, U.N. GAOR, Hum. Rts. Comm., 49th Sess., U.N. Doc. CCPR/C/49/D/469 (1991), reprinted United Nations Home Page, <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/0c4df251fe2fbc24802567230056fc46? Opendocument> (visited December 6, 1999) 9

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. a/39/51 (1984) 6

Gen. Comment 20[44], ¶ 6, U.N. Doc. CCPR/C/21/Add. 3(1992) 8

International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) 6, 7

Statement of Conrad Harper, Legal Advisor, United States Department of State, to the United Nations Human Rights Committee, U.N. GAOR Hum. Rts. Comm., 53rd Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995) 7

United Nations Home Page <http://www.un.org/Depts/Treaty/final/ts2/newsfiles/part_boo/iv_boo/iv_4html> (visited December 6, 1999) 6

United Nations Home Page <http://www.un.org/Depts/Treaty/final/ts2/newsfiles/partboo/iv boo/iv9html> (visited December 6, 1999). 6

TABLE OF AUTHORITIES – Continued

Page

LAW REVIEW ARTICLES

Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L. L. 1 (1993) 8

Gordan A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CINN. L. REV. 3 (1993) 8

Connie de la Vega, *Protecting Economic, Social and Cultural Rights*, 15 WHITTIER L. REV. 471 (1994)..... 8

Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 1 RUTGERS RACE & THE L. REV. 193 (1999) 8

David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993) 7

BRIEF AMICI CURIAE

INTEREST OF AMICI CURIAE

Human Rights Advocates and Minnesota Advocates for Human Rights hereby request that the Court consider this brief pursuant to Rule 37.2(a) in support of Petitioner Bryan. Consent of Petitioner's Counsel of Record and the State District Attorney's Office has been obtained.[1]

Human Rights Advocates, a California non-profit corporation, founded in 1978, with national and international membership, endeavors to advance the cause of human rights to ensure that the most basic protections are afforded to everyone. Human Rights Advocates has a Special Category II Consultative Status at the United Nations. Human Rights Advocates has duly submitted briefs as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes at issue.[2]

---

[1] Letters from both counsel consenting to the filing of this brief are being sent with this brief to the Clerk of this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, their members or their counsel made a monetary contribution to the preparation and submission of the brief.

[2] Examples of *amicus* briefs filed by Human Rights Advocates include those in the following cases: *Coalition for Economic Equity v. Wilson*, 110 F. 3d 1431 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Hilao v. Estate of Marcos*, 103 F. 3d 789 (9th Cir. 1996); *Butt v. State of Calif.*, 4 Cal. 4th 668, 842 P. 2d 1240, 15 Cal. Rptr. 2d 480 (1992).

Minnesota Advocates for Human Rights, founded in 1983, is the largest Midwest-based non-governmental organization engaged in international human rights work. The organization has some 4,000 members. Minnesota Advocates for Human Rights also has a Special Category II Consultative Status in the United Nations. Minnesota Advocates for Human Rights has received international recognition for a broad range of innovative programs to promote human rights and prevent the violation of those rights.

Human Rights Advocates and Minnesota Advocates for Human Rights would like to take the opportunity to advise this Court of the pertinent international standards that may provide assistance in interpreting the United States constitutional provisions involved in this case. Specifically, Human Rights Advocates and Minnesota Advocates for Human Rights would like to address issues raised by Petitioner regarding the use of the electric chair. The applicable international standards include: 1) two international treaties ratified by the United States, and 2) the interpretation of relevant clauses of one of the treaties by the body specifically charged with enforcing the treaty.

The treaty law in this area requires that the death penalty be applied in such a manner as to cause the least possible physical and mental suffering. The parties have failed to address that requirement. Because the Court may find this new information helpful, Human Rights Advocates and Minnesota Advocates for Human Rights request that the Court consider it.

STATEMENT OF FACTS

In his petition to the Florida Supreme Court challenging his imminent execution by electrocution, Bryan asked the court to consider multiple recent executions in Florida where severe malfunctions occurred. The use of Florida's electric chair does not result in instant death and has in many cases caused condemned prisoners to suffer pain, disfigurement, mutilation, and degradation. The July 1999 execution of Allen Lee Davis, the March 1997 execution of Pedro Medina, and the May 1990 execution of Jesse Tafero have all resulted in severe physical violence inappropriate to the conduct of a civilized society. Because of the unreliability of the Florida electric chair, "each time an execution is carried out, the courts wait in dread anticipation of some 'unforeseeable accident . . . ' " *Provenzano v. Moore*, No. 95,973, slip op. at 10 (Harding, C.J., joined by Lewis, J., specially concurring) (Appendix B to the petition for a writ of certiorari).

Jesse Tafero was executed on May 4, 1990. "When Tafero's electrocution began, smoke and flames instantaneously spurted from his head for a distance of as much as twelve inches. The flames and smoke emanated from the area around a metallic skull cap, inside of which was a saline-soaked synthetic sponge meant to increase the flow of electricity to the head." *Buenoano v. State*, 565 So. 2d 309, 310 (1990). Due to the smoke and flames, officials stopped the first surge of electricity. After two more jolts were administered, "a medical examiner found that Tafero was dead some six or seven minutes after the execution commenced." *Id.* at 311. "The Department also noted that most executions last longer than seven minutes." *Id.* at 311. Photographs of Tafero's body indicated a

large area of charred and blackened flesh on the top and left-hand side of the head. *Id.* at 314. "According to [medical examiner] Robert H. Kirschner, M.D., Tafero was not dead until the third jolt of electricity was administered and may have remained conscious during the first and second jolts." *Id.* at 314. "Kirschner also concluded that the charring of flesh occurred at least in part because Tafero did not receive the full 2,000 volts of electricity the chair is supposed to administer." *Id.* at 314.

The March 1997 execution of Pedro Medina also included severe mutilation by burning and lasted several minutes. When Pedro Medina was executed on March 25, 1997, the following events occurred:

> When the electrical current was activated, within seconds . . . smoke emanated from under the right side of Medina's head piece, followed by a 4 to 5 inch yellow-orange flame which lasted 4 to 5 seconds and then disappeared. After the flame went out, more smoke emanated from under the head piece to the extent that the death chamber was filled with smoke – but the smoke was not dense enough to impair visibility in or through the chamber. The smoke continued until the electrical current was shut off in the middle of the third cycle. *Jones v. Florida*, 701 So. 2d 76, 86 (1997).

When no pulse or heart sounds were detectable, the attending physician, Dr. Almojera, examined Medina and pronounced him dead at 7:10 a.m. *Id.* at 86. During Dr. Almojera's last examination Medina's chest was seen to move two or three times in a two to four minute period, and a couple of witnesses thought Medina was trying to breathe. *Id.* at 86. "Several witnesses did not describe it as

attempted breathing, but as a lurching, spasmodic movement, a shudder, and outward not upward movement." *Id.* at 86.

The most recent use of Florida's electric chair involved the "bloody" execution of Allen Lee Davis on July 8, 1999. *Provenzano v. Moore*, slip op. at 25 (Shaw, J., joined by Anstead, J. dissenting) (Appendix B to the petition for a writ of certiorari). According to witnesses' accounts, when Davis was being strapped into the chair, guards placed a solid leather mouth strap across his mouth and nose, which likely caused partial suffocation. *Id.* at 48 (Appendix B to the petition for a writ of certiorari). Prior to the actual electrocution, blood began flowing from his nose. Dr. Robert Kirschner, the forensic pathologist who conducted the post-execution autopsy, concluded that Davis had at least been partially asphyxiated prior to electrocution. *Id.* at 49 (Appendix B to the petition for a writ of certiorari). Aubrey D. Thornton, Assistant Warden at Florida State Prison testified that Davis' face began to turn red after the mouth strap was applied. After Davis' airflow had been blocked, he made several sounds under the face-mask which were described as muffled screams, moans, or yells, as if he were attempting to get the guards' attention. *Id.* at 49 (Appendix B to the petition for a writ of certiorari).

These examples highlight some of the worst instances of physical pain and mutilation inflicted on condemned prisoners in Florida. In light of the continued malfunctions in Florida's electric chair over the past decade, the Court must consider whether the use of that method of

execution violates the Eighth Amendment as well as treaty standards.

ARGUMENT

I. UNITED STATES TREATY OBLIGATIONS SUPPORT PETITIONER'S CONTENTION THAT THE ELECTRIC CHAIR VIOLATES THE EIGHTH AMENDMENT

The International Covenant on Civil and Political Rights (G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (hereinafter "Covenant")) is a United Nations treaty ratified by the United States in 1992. (138 Cong. Rec. S4781-84 (daily ed., April 2, 1992).) As of December 6, 1999, there were 144 parties to the Covenant. (*See* United Nations Home Page <http://www.un.org/Depts/Treaty/final/ts2/newsfiles/part___boo/iv___boo/iv___4html> (visited December 6, 1999).) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (hereinafter "Convention Against Torture")) is also a treaty ratified by the United States in 1994. (136 Cong. Rec. S17486-92 (daily ed., Oct 27, 1990).) As of December 6, 1999, there were 118 parties to the Convention. (*See* United Nations Home Page, <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part___boo/iv___boo/iv___9.html> (visited December 6, 1999).)

Under Article VI, clause 2, of the United States Constitution, a ratified treaty is part of the supreme law of the land. Ratification is not to be treated lightly, and such action by the President and the Senate evidences the acceptance of the language of the Covenant, except to the extent that reservations are specified. The document should, therefore, provide meaningful guidance to the Court.[3]

Article 7 of the Covenant provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." (Covenant, art. 7.) Article 4(2) of the Covenant indicates that Article 7 is at no times derogable. (Covenant, art. 4.) In addition to the prohibition against torture, the Convention Against Torture in Article 16 provides:

---

[3] The Senate consent to the Covenant was accompanied by a declaration "that the provisions of Articles 1 through 27 are not self-executing." (138 Cong. Rec. S4783 (daily ed., April 2, 1992).) The legislative history shows that those words were intended to prohibit only a private and independent cause of action. The declaration does not preclude courts from using the treaty as a guide in elucidating constitutional guarantees. The United States government's position is that "courts could refer to the Covenant and take guidance from it." (Statement of Conrad Harper, Legal Advisor, United States Department of State, to the United Nations Human Rights Committee, U.N. GAOR Hum. Rts. Comm., 53rd Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995).) Further, the declaration does not affect the obligations of the United States under the Covenant. (*See*, David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993).)

> "1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

The Human Rights Committee is the body which officially monitors compliance with the Covenant. In its comments concerning Article 7 the Committee stated that "when the death penalty is applied by a State party for the most serious crimes, . . . it must be carried out in such a way as to cause the least possible physical and mental suffering." (Gen. Comment 20[44], ¶ 6, U.N. Doc. CCPR/C/21/Add. 3 (1992).) The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments." (U.S. Const. amend. VIII.) Because the United States now has ratified the Covenant, the development of Article 7 should help courts construe the scope of the Eighth Amendment's final clause. The Covenant has become a part of United States law and thus surely is relevant to the meaning of the Eighth Amendment.[4]

---

[4] International human rights standards have often been useful tools for interpreting United States laws. *See generally,* Connie de la Vega, *Protecting Economic, Social and Cultural Rights,* 15 WHITTIER L. REV. 471, 476-77 (1994); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses,* 52 U. CIN. L. REV. 3 (1993). *See also,* Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue,* 1 RUTGERS RACE & THE L. REV. 193 (1999); Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective,* 14 MICH. J. INT'L L. 1 (1993).

From the evidence in this case it seems apparent that the imposition of the death penalty by the electric chair does violate Article 7, as plainly written and officially construed. The electric chair does not "cause the least possible physical and mental suffering."[5]

The Human Rights Committee was given the opportunity to again construe Article 7 in the case of *Charles Chitat Ng* (U.N. GAOR, Hum. Rts. Comm., 49th Sess., U.N. Doc. CCPR/C/49/D/469 (1991), *reprinted in* United Nations Home Page, <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/0c4df251fe2fbc2480256723 0056fc46?Opendocument> (visited December 6, 1999).) After fleeing to Canada, Ng was returned to the United States under the extradition treaty between the two nations. He submitted to the Human Rights Committee a communication claiming that the extradition to California exposed him to probable execution by gas asphyxiation which violated his rights under the Covenant. Under the extradition treaty, Canada could have sought assurance that he would not be punished with death, but did not.

---

[5] The United States reservation (to the Covenant) that cruel, inhuman, or degrading treatment or punishment means the cruel and unusual punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments (138 Cong. Rec. S4783 (daily ed., April 2, 1992)) by no means precludes Article 7's application to this case. Article 7 is not inconsistent with the Eighth Amendment regarding the facts of this case. The language of the Eighth Amendment is broad enough to forbid the use of the electric chair as a means of execution, and United States courts should not ignore international pronouncements on treaties to which it is party.

The Human Rights Committee concluded that Canada violated Article 7 when it refused to seek such assurance since it could reasonably have foreseen that Ng, if sentenced to death, would be executed by means of lethal gas. The Committee specifically held that "execution by gas asphyxiation, should the death penalty be imposed on [Ng], would not meet the test of 'least possible physical and mental suffering', and constitutes cruel and inhuman treatment . . . " and Canada thus violated Article 7 of the Covenant. *Id.* at 21. The Committee based its findings on evidence submitted by Ng regarding the length of consciousness after asphyxiation begins. Ng also references the execution record of Robert Harris, noting that death by asphyxiation can take up to twelve minutes, during which time "condemned persons remain conscious, experience obvious pain and agony, drool and convulse and often soil themselves." *Id.* at 14.

The botched executions in Florida have evidenced similar suffering by the people being put to death as was described in the Ng case, both in the length of time involved as well as the physical manifestations of pain. Several of the cases in Florida have taken seven minutes or more for the person to die. The blood, attempts to breathe and scream, and partial asphyxiation are all indications of the extreme pain that has been involved in those cases. Interestingly, a court in California made the following factual findings with respect to death by lethal gas:

> Inmates who are put to death in the gas chamber at San Quentin do not become immediately unconscious upon the first breath of

> lethal gas. An inmate probably remains conscious anywhere from 15 seconds to one minute, and there is a substantial likelihood that consciousness, or a waxing and waning of consciousness, persists for several additional minutes. During this time, inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells. The experience of "air hunger" is akin to the experience of a major heart attack, or to being held under water. Other possible effects to the cyanide gas include tetany, an exquisitely painful concentration of the muscles, and painful build-up of lactic acid and adrenaline. Cyanide-induced cellular suffocation causes anxiety, panic, terror, and pain. *Fierro v. Gomez*, 865 F. Supp. 1387, 1404 (N.D. Cal. 1994).

Even though the district court's decision has been vacated, the Ninth Circuit has upheld the findings of extreme pain and has concluded that the use of execution by lethal gas is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments. *See La Grande v. Stewart*, 173 F. 3d 1144, 1149 (9th Cir. 1999). That decision is in conformity with the Human Rights Committee decision in the Ng case.

At this point in Florida, persons on death row not only face the possibility of being subjected to extreme pain, but in addition must suffer the anxiety that it may. *Amici* ask the Court to consider the significant parallel between the cases and the treaty standards that apply when reviewing the facts of this case.

CONCLUSION

The evidence in this case clearly indicates that the imposition of the death penalty by the electric chair violates the International Covenant on Civil and Political Rights. Because the United States is a party to the treaty, the Eighth Amendment should be construed so as not to conflict with it. Hence, the decision of the Supreme Court of Florida should be reversed.

Respectfully submitted,

Dated: December 17, 1999

CONSTANCE DE LA VEGA
Counsel of Record
Attorney for *Amicus Curiae*
Human Rights Advocates

DAVID WEISSBRODT
Legal Counsel for *Amicus Curiae*
Minnesota Advocates for
Human Rights

(10)

DEC 20 1999

(5)

Supreme Court, U.S.
FILED
DEC 20 1999
OFFICE OF THE CLERK

No. 99-6723

In The

Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

v.

MICHAEL MOORE, Secretary,
Florida Department of Corrections,

Respondent.

**On Writ Of Certiorari To
The Supreme Court Of Florida**

BRIEF OF THE LOUIS STEIN CENTER FOR LAW AND ETHICS, FORDHAM UNIVERSITY SCHOOL OF LAW, AND PROFESSORS EDWARD A. BRUNNER, M.D., Ph.D., ROBERT A. BURT, J.D., MARGARET A. FARLEY, Ph.D., AND SHERWIN B. NULAND, M.D., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BRUCE A. GREEN*
Louis Stein Professor of Law
Director, Louis Stein Center for Law and Ethics
FORDHAM UNIVERSITY SCHOOL OF LAW
140 West 62nd Street
New York, New York 10023
(212) 636-6851
**Counsel of Record*

36 pp

QUESTION PRESENTED

Whether execution by electrocution generally, and in Florida's electric chair specifically, violate the Eighth Amendment's Cruel and Unusual Punishments Clause.

TABLE OF CONTENTS

Interest of *Amicus Curiae* 1

Statement 3

Summary of Argument 4

ARGUMENT:

I. KEMMLER WARRANTS RECONSIDERATION UNDER MODERN EIGHTH AMENDMENT STANDARDS 5

II. MODERN EIGHTH AMENDMENT ANALYSIS DEMONSTRATES THAT EXECUTION BY ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT 8

A. Electrocution Constitutes "Unnecessary and Wanton Infliction of Pain" 9

B. Electrocution Constitutes "Physical Violence" and Offends "Human Dignity" 9

C. Electrocution Constitutes the Risk of "Unnecessary and Wanton Infliction of Pain" 10

D. Electrocution Violates "Evolving Standards of Decency" 11

Conclusion 17

Appendix

Table 1 . . . . . 1a

Table 2 . . . . . 2a

Table 3 . . . . . 3a

Table 4 . . . . . 4a

Table 5 . . . . . 5a

Table 6 . . . . . 7a

Table 7 . . . . . 8a

Table 8 . . . . . 9a

Table 9 . . . . . 10a

TABLE OF AUTHORITIES

Cases

Enmund v. Florida, 458 U.S. 782 (1981) 14

Furman v. Georgia, 408 U.S. 238 (1972) 4, 13

Gregg v. Georgia, 428 U.S. 153 (1976) 9, 15

Jones v. State, 701 So.2d 76 (Fla. 1997) 4

In re Kemmler, 136 U.S. 436 (1890) 4, 13

Malloy v. South Carolina, 237 U.S. 180 (1914) 12

Penry v. Lynaugh, 492 U.S. 302 (1989) 15

Poyner v. Murray, 508 U.S. 931 (1993) 7

Provenzano v. Moore, No. 95973, 1999 WL 756012 (Fla. Sept. 24, 1999) 3, 8, 16

Robinson v. California, 370 U.S. 660 (1962) 8

Stanford v. Kentucky, 492 U.S. 361 (1989) 15

Constitution

Amendment VIII . . . . . *Passim*

Miscellaneous

Steve Bousquet, *Floridians Favor Move from Electric Chair to Injection, Poll Shows*, Miami Herald, Nov. 8, 1999 16

Craig Brandon, The Electric Chair: An Unnatural American History 7-159 (1999) 7

Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319 (1997) 5

Deborah W. Denno, *Is Electrocution An Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm. & Mary L. Rev. 551 (1994) 5

Carla McClain, *Arizona Gas Chamber Stays*, Gannet News Serv., Apr. 7, 1992, *available in* LEXIS, Nexis Library, Wires File 16

Sherwin B. Nuland, M.D., *Cruel and Unusual*, N.Y. Times, Nov. 9, 1999, at A25 9

Sherwin B. Nuland, MD., How We Die: Reflections on Life's Final Chapter (1993) 9

Poll: Electric Chair Unpopular in Florida, OMAHA WORLD-HERALD, Nov. 7, 1999, at 22a 16

George Skelton, *Death Penalty Still Strong in State*, L.A. TIMES, Apr. 29, 1992, at A1, A18 16

BRIEF OF THE LOUIS STEIN CENTER FOR LAW AND ETHICS, FORDHAM UNIVERSITY SCHOOL OF LAW, AND PROFESSORS EDWARD A. BRUNNER, M.D., Ph.D., ROBERT A. BURT, J.D., MARGARET A. FARLEY, Ph.D., AND SHERWIN B. NULAND, M.D., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Louis Stein Center for Law and Ethics is based at Fordham University School of Law. The Stein Center reflects the law school's commitment to teaching, legal scholarship, and professional service that promote the role of ethical perspectives in legal practice, legal institutions, and the development of the law itself. Toward this end, the Stein Center sponsors programs, develops publications, and supports scholarship on contemporary issues of law and ethics, and encourages professional and public institutions to integrate moral perspectives into their work. Over the past decade, the Stein Center and affiliated Fordham Law faculty have examined the ethical dimensions of the administration of criminal justice, as well as questions of biomedical ethics. Because *Bryan v. Moore* calls into question the extent of courts' adherence to "evolving standards of decency," we believe that the Stein Center's consideration of the contours of the Eighth Amendment's proscription against cruel and unusual punishment may provide the Court with a unique perspective on the issues relevant to this case.

---

[1] Both parties have consented to the appearance of *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

Edward A. Brunner, M.D., Ph.D., is Emeritus Chairman and James Eckenhoff Professor of Anesthesia at Northwestern University School of Medicine. Professor Brunner, a specialist in anesthesiology and pain therapy, has authored many articles on anesthesiology and the amelioration of pain. Professor Brunner also founded the Low Back and Pain Clinic at the Rehabilitation Institute of Chicago and has been active in the Anesthesia Department's pain clinic at Northwestern Memorial Hospital.

Robert A. Burt, J.D., is the Alexander M. Bickel Professor of Law at Yale University. Professor Burt, an expert in constitutional law and law and medicine, is the author of *Taking Care of Strangers: The Rule of Law in Doctor-Patient Relations* and *The Constitution in Conflict*, as well as numerous articles addressing constitutional and medical ethics issues. Since 1990, Professor Burt has chaired the Board of Trustees of the Judge David L. Bazelon Center for Mental Health Law and is currently the chair or member of many other medical/legal organizations, including the Institute of Medicine and the National Academy of Sciences.

Margaret A. Farley, Ph.D., is the Gilbert L. Stark Professor of Christian Ethics at Yale University Divinity School. Professor Farley, who has won a long list of awards and published widely in books and articles on topics addressing Christian, medical, and societal ethics, is currently president of the Catholic Theological Society of America and past president of the Society of Christian Ethics. Professor Farley, an advisory board member of various ethics committees, also co-chairs the Executive Committee of the Yale Interdisciplinary Bioethics Forum, which coordinates all bioethics research and teaching in the various schools at Yale University.

Sherwin B. Nuland, M.D., is Clinical Professor of Surgery at Yale School of Medicine. Professor Nuland is the author of *Doctors: The Biography of Medicine*, *Medicine: The Art of Healing*, *How We Die* (winner of the National Book Award in 1994), and *The Wisdom of the Body: How We Live*. Professor Nuland is chairman of the board of managers of the *Journal of the History of Medicine and Allied Sciences*, literary editor of *Connecticut Medicine*, a member of the editorial board of *Perspectives in Biology and Medicine*, as well as a member of the Yale Interdisciplinary Bioethics Forum.

STATEMENT

On July 8, 1999, Allen Lee Davis' execution in Florida's electric chair gained national and international attention. Post-execution photos and testimony indicated that Davis suffered a nose bleed that poured down his shirt, that he evidenced deep burns on his head, face, and body, and that he was partially asphyxiated before and during the electrocution from the five-inch-wide mouth strap that belted him to the chair's head-rest. There was also testimony that after guards placed the mouth strap on him, Davis' face became red and he repeatedly mouthed and attempted to yell to the guards in an effort to get their attention. *Provenzano v. Moore*, No. 95973, 1999 WL 756012 (Fla. Sept. 24, 1999) *20-22 (Shaw, J., dissenting). In the post-execution photos taken by Department of Corrections personnel, "a sponge placed under [Davis'] head-piece obscures the top portion of his head down to his eyebrows; because of the width of the mouth-strap, only a small portion of Davis' face is visible above the mouth-strap and below the sponge, and that portion is bright purple and scrunched tightly upwards; his eyes are clenched shut and his nose is pushed so severely upward that it is barely visible above the mouth-strap." *Id.* at *22.

Thomas Provenzano, who was scheduled to be executed in Florida State Prison the next day, filed a petition with the Florida Supreme Court seeking a stay of execution and arguing that the state's electric chair was cruel and unusual punishment. The Florida Supreme Court remanded Provenzano's case to the circuit court to conduct an evidentiary hearing on the constitutionality of Florida's electric chair. After the hearing, the circuit court held that electrocution in Florida's electric "is not unconstitutional." *Provenzano*, at *3. In a 4-3 per curiam opinion, a plurality of the Florida Supreme Court affirmed in three pages the circuit court's "finding that the electric chair is not unconstitutional." *Id.* at *3. Moreover, the plurality reiterated its previous holding in *Jones v. State*, 701 So.2d 76 (Fla. 1997), that had rejected the claim that Florida's use of electrocution violated "evolving standards of decency." *Provenzano*, at *3. The court implied there was no need to readdress the "evolving standards of decency" issue.

SUMMARY OF ARGUMENT

The Eighth Amendment was enacted to proscribe "torturous" and "barbarous" punishments, the penalties most commonly associated with executions. *See Furman v. Georgia*, 408 U.S. 238 (1972)(per curiam). As yet, however, no court has provided a modern and comprehensive Eighth Amendment review of any execution method, including electrocution. In general, courts dismiss constitutional challenges to electrocution entirely by relying on the outdated precedent of *In re Kemmler*, 136 U.S. 436 (1890). In *Kemmler*, the Court held that the Eighth Amendment did not apply to the states and therefore never addressed directly the constitutionality of electrocution. *Id.* at 443. Alternatively, as in *Provenzano*, courts engage in a brief Eighth Amendment review that focuses predominantly on the amount of pain inflicted while ignoring other Eighth Amendment standards.

A modern and comprehensive Eighth Amendment review of medical, historical, and societal evidence demonstrates that electrocution does not comport with "evolving standards of decency." Electrocution inflicts unnecessary pain and physical violence, and is at risk of continuing to do so given a demonstrated pattern of botched electrocutions. Moreover, legislative trends show a clear and consistent break from electrocution. If the Cruel and Unusual Punishments Clause is applied in the way that it was originally intended, the Court would find electrocution unconstitutional.

I. *KEMMLER* WARRANTS RECONSIDERATION UNDER MODERN EIGHTH AMENDMENT STANDARDS

When the United States Constitution was being ratified, the Framers included in the Bill of Rights a prohibition of cruel and unusual punishments created expressly to proscribe the kinds of "torturous" and "barbarous" penalties associated with certain methods of execution. *See Furman*, 408 U.S. at 238. To date, however, courts generally have provided only superficial Eighth Amendment review of the constitutionality of execution methods, particularly electrocution. Most commonly, courts dismiss the electrocution challenge entirely (often in one sentence) by relying on the century-old precedent of *In re Kemmler*, 136 U.S. 436 (1890). *See* Deborah W. Denno, *Is Electrocution An Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm. & Mary L. Rev. 551, 616-23 (1994) [hereinafter Denno-I] (collecting authorities); Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 321-54

(1997) [hereinafter, Denno-II] (collecting authorities).[2] In *Kemmler*, the Court held that the Eighth Amendment did not apply to the states and deferred to the New York legislature's conclusion that electrocution was not a cruel and unusual punishment under the state's Electrical Execution Act. *Kemmler*, 136 U.S. at 443.

For a range of reasons, *Kemmler*'s precedential value has diminished substantially over the last century. First, the *Kemmler* Court never specifically employed the Cruel and Unusual Punishments Clause even though post-incorporation cases have continued mistakenly to cite *Kemmler* as an Eighth Amendment case. *See* Denno-II, 82 Iowa L. Rev. at 334 (collecting cases). Next, the *Kemmler* Court adopted the burden of proof promulgated by the New York court that required the prisoner to show "beyond doubt" that the execution method was cruel and unusual. *Kemmler*, 136 U.S. at 442. However, this standard has not been used since *Kemmler* in death penalty cases. Although courts, as in *Provenzano*, typically fail to identify the burden of proof when reviewing the constitutionality of execution methods, the burden of proof courts cite most frequently -- preponderance of the evidence -- is far less stringent. Denno-II, 82 Iowa L. Rev. at 335 (collecting cases). Moreover, a court reviewing electrocution under the Eighth Amendment would not defer to the state's legislature to the extent this Court did when deciding *Kemmler*. *Kemmler*, 136 U.S. at 442-43 (quoting the New York Supreme Court's explanation of why it deferred to the legislature). Most critically, *Kemmler* was decided before anyone had been electrocuted; therefore, the Court had limited evidence in reaching its conclusion. Historical analyses suggest

---

[2] Reprints of Professor Denno's *William & Mary Law Review* and *Iowa Law Review* articles are being lodged with the Clerk, for the convenience of the Court.

that *Kemmler* was based in large part on the law, science, and politics of the time as well as the particular uncertainties resulting from the passage of New York's Electrocution Act. *See generally* Craig Brandon, The Electric Chair: An Unnatural American History 7-159 (1999); Denno-I, 35 Wm. L. Rev. at 562-604 (detailing the competition between Thomas Edison and George Westinghouse concerning whose current would dominate the electrical industry).

Both legally and scientifically, then, Kemmler's 1890 electrocution was a "human experiment." By all accounts, the experiment failed. In graphic detail, the media reported the confusion, mistakes, and physical violence that resulted from Kemmler's execution. Regardless, electrocution became a popular means of execution in other states, which also reported mishaps and botches. *See* Brandon at 7-257; Denno-I, 35 Wm. L. Rev. at 599-676. Seemingly, the desire to perpetuate the death penalty outweighed any humanitarian goal to switch to a new method. *See* Denno-II, 82 Iowa L. Rev. at 388-94.

The *Kemmler* Court's factual assumptions regarding the acceptability of electrocution have no support in light of modern evidence of electrocution's effects on the human body. *See, e.g., Poyner v. Murray*, 508 U.S. 931, 933 (1993) (Souter, J., joined by Blackmun and Stevens, JJ, respecting denial of certiorari) (emphasizing that *Kemmler* was not "a dispositive response to litigation of the issue [of the constitutionality of electrocution] in light of modern knowledge"). One of the *Kemmler* Court's legal conclusions, however, remains viable: "Punishments are cruel when they involve torture or a lingering death.... something more than the mere extinguishment of life." *Kemmler*, 136 U.S. at 447.

Since 1962, when the Court held in *Robinson v. California*, 370 U.S. 660, 666 (1962), that the Eighth

Amendment applies to the states, the Court's Eighth Amendment doctrine has emphasized an "evolving standard of decency." *See* Denno-II, 82 Iowa L. Rev. at 337-38 (collecting cases). Consistent with the "evolving standards of decency" and *Kemmler*'s "torture and lingering death" standards, the Court's Eighth Amendment jurisprudence suggests four interrelated criteria for determining the constitutionality of an execution method : (1) "the unnecessary and wanton infliction of pain," (2) "nothing less than" human dignity (e.g., "a minimization of physical violence during execution"), (3) the risk of "unnecessary and wanton infliction of pain," and (4) "evolving standards of decency" as measured by "objective factors to the maximum extent possible," such as legislation passed by elected representatives or public attitudes. *See* Denno-II, 82 Iowa L. Rev. at 321-402 (collecting cases).

In *Provenzano*, the Florida Supreme Court's skeletal *per curiam* opinion virtually ignored the great bulk of the Court's Eighth Amendment jurisprudence. Therefore, the Florida Supreme Court effectively begged the question of electrocution's continued propriety under an "evolving standards of decency" test. Indeed, no court has reviewed the constitutionality of electrocution under modern Eighth Amendment standards which consider, as a substantial part of an "evolving standards of decency" analysis, legislative trends and related information, such as public opinion polls.

II. MODERN EIGHTH AMENDMENT ANALYSIS DEMONSTRATES THAT EXECUTION BY ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Under the Court's modern Eighth Amendment jurisprudence, pain is only one of a range of factors suggesting that an execution by electrocution constitutes cruel and

unusual punishment. This section discusses briefly the pain and physical violence of electrocution, but then focuses on other Eighth Amendment criteria, most particularly the strong showing of legislative trends away from electrocution.

A. Electrocution Constitutes "Unnecessary and Wanton Infliction of Pain"

The most recent research and eyewitness observations suggest that many factors associated with electrocution, such as severe burning, boiling body fluids, asphyxiation, and cardiac arrest, can cause extreme pain when unconsciousness is not instantaneous. *See* Denno-II, 82 Iowa L. Rev. at 354-58 (summarizing available medical publications, eyewitness reports, and affidavit testimony). Table 9 (App., *infra*) provides brief summaries of nineteen botched electrocutions following *Gregg v. Georgia*, 428 U.S. 153 (1976), when the Court ended its moratorium on the death penalty. *See id.* at 168-207. These botches provide considerable evidence of extensive pain and suffering experienced by electrocuted prisoners. Notably, even a routine or "properly performed" electrocution can cause intense pain and a lingering death. *See* Sherwin B. Nuland, M.D., *Cruel and Unusual*, N.Y. Times, Nov. 9, 1999, at A25 ("Even when it functions exactly as it should, the electric chair is a brutal killer."); *see also* Sherwin B. Nuland, How We Die: Reflections on Life's Final Chapter (1993) (discussing different methods of death and the pain associated with them).

B. Electrocution Constitutes "Physical Violence" and Offends "Human Dignity"

Evidence of mutilation resulting from electrocution is derived from three sources: post-execution autopsies, which are required in some states; observations provided by experts; and

witnesses' descriptions of executions, some of which are detailed in App., Table 9, *infra*. The effects of electrocution on the human body include the following: charring of the skin and severe external burning, such as the possible burning away of the ear; exploding of the penis; defecation and micturition, which necessitate that the condemned person wear a diaper; drooling and vomiting; blood flowing from facial orifices; intense muscle spasms and contractions; odors resulting from the burning of the skin and the body; and extensive sweating and swelling of skin tissue. Denno-II, 82 Iowa L. Rev. at 359.

Similar to Allen Lee Davis' execution, for example, the execution of Wilbert Lee Evans in Virginia resulted in substantial bleeding. According to accounts by witnesses and reporters, blood poured from Evans' eyes and nose, drenching his shirt. Moreover, the flames witnessed during the 1990 execution of Jesse Joseph Tafero and the 1997 execution of Pedro Medina made the public explicitly aware of how a human body could be burned and distorted during an electrocution. *See* App. Table 9, *infra*.

C. Electrocution Constitutes the Risk of "Unnecessary and Wanton Infliction of Pain"

When legislatures or courts validate the use of electrocution, they presume that prison officials will carry out executions properly and that equipment will not malfunction. A focus on electrocutions in all states and over time, however, reveals the potential for prison personnel's contribution to a risk of unnecessary pain.

In 1990, for example, the botched electrocution of Jesse Joseph Tafero in Florida suggested there was a substantial likelihood the state's execution procedure could result in severe pain and prolonged agony. Subsequently, a pattern of

consecutive malfunctions has been established with the botched electrocution of Pedro Medina and, now, James Allen Davis. Tafero's and Medina's executions shared similar problems (most particularly difficulties with the headset sponge), that created the flames, smoke, smell, and burning in both executions. *See* App. Table 9, *infra*. Ironically, Tafero's and Medina's executions closely resembled William Kemmler's over a century ago. The fact that a new and additional set of problems accompanied the execution of James Allen Davis suggests that a continuing pattern of botches is highly foreseeable. Indeed, a pattern of consecutive botching also occurred in Virginia even after the state rewired the electric chair due to prior botching. These problems prompted Virginia to allow inmates a choice between electrocution and lethal injection. *See* Denno-II, 82 Iowa L. Rev. at 362 & n. 262.

D. Electrocution Contravenes "Evolving Standards of Decency"

"Evolving standards of decency" can be measured by legislative trends regarding the imposition of a particular punishment. A thorough assessment should consider legislative changes in execution methods over the course of the twentieth century, starting with the New York legislature's 1888 selection of electrocution. *See* Denno-II, 82 Iowa L. Rev. at 363-408, 439-64; App. Tables 2-4, *infra*.

In general, three themes emerge from an 1888-1999 overview of legislative trends in the use of the five available methods of execution in the United States: hanging, firing squad, electrocution, lethal gas, and lethal injection. First, most state legislatures purport to change from one method of execution to another, or to a "choice" between a state's old method of execution and lethal injection, for humanitarian reasons, although other factors, such as cost, can also be

influential. Second, legislatures evidence a fairly consistent pattern of movement from one method of execution to another, suggesting that states take notice of the methods used, and the difficulties encountered, by other states. Third, since 1977, when lethal injection was first introduced, no state has changed to, or included as an additional "choice," any other method of execution but lethal injection. In general, states' changes in execution methods have occurred in the following order: from hanging to electrocution to lethal gas to lethal injection. The firing squad has been used only sporadically in only a few states. *See* Denno-II, 82 Iowa L. Rev. at 363-408, 439-64; App. Tables 2-4, *infra*.

In 1853, hanging, the "nearly universal form of execution," was used in 48 "states" (many of which were still considered territories at that time). Nearly four decades later, however, concerns over the barbarity of hanging and the subsequent advent of electrocution prompted states to change their method of execution from hanging to electrocution. Even though the first electrocutions were grotesquely botched, by 1913, a total of 15 states had changed to electrocution as a result of "a well-grounded belief that electrocution is less painful and more humane than hanging." *Malloy v. South Carolina*, 237 U.S. 180, 185 (1914). By 1949, 26 states had changed to electrocution, the largest number of states that had ever used electrocution at the same time. However, since 1949, no state has selected electrocution as its method of execution. In other words, it has been a half century since any legislature has adopted electrocution as a method of execution. *See* Denno-II, 82 Iowa L. Rev. at 363-408, 439-64; App. Tables 2-4, *infra*.

The gradual cessation of states' adoption of electrocution appears to be attributable to Nevada's switch in 1921 from hanging and shooting to lethal gas in accordance with the state's new Humane Death Bill. By 1955, 11 states

were using lethal gas and 22 states were using electrocution. By 1973, 12 states were using lethal gas and 20 states were using electrocution. Since 1973, however, no state has selected lethal gas as a method of execution. *See* Denno-II, 82 Iowa L. Rev. at 366-67.

With each new lethal gas statute came controversy and constitutional challenges, both before and after the Court's moratorium on capital punishment in *Furman*, 408 U.S. at 238. By 1994, there was a "national consensus" concluding that lethal gas was not an acceptable method of execution. *See* Denno-II, 82 Iowa L. Rev. at 368.

Recent research indicates that there is an even more striking national consensus rejecting electrocution. Since 1973, 12 states have abandoned lethal gas as their exclusive method of execution. By contrast, since 1949, 22 states have abandoned electrocution as their exclusive method of execution. Moreover, 7 of these states have abandoned electrocution in the last six years. *See* Denno-II, 82 Iowa L. Rev. at 368-70; App. Tables 1-4, *infra*.

There are historical differences between the uses of electrocution and lethal gas that point to states' initial, relative reluctance, to reject electrocution. First, over the course of the century, states have relied on *Kemmler* to support the retention of electrocution whereas no Court case has addressed the constitutionality of lethal gas. Next, electrocution was introduced three decades earlier than lethal gas during a time when science was substantially less advanced; therefore, lethal gas, which was also a considerably more visible method than electrocution, had the advantage of greater immediate scrutiny. Nonetheless, electrocution and lethal gas have comparable "legislative lifelines" (61 years and 51 years, respectively) in terms of the point at which they were introduced and the point

at which they were no longer adopted, thereby suggesting comparable periods of tolerance. (Electrocution was first introduced in 1888 and last adopted in 1949; lethal gas was first introduced in 1921 and last adopted in 1973.) Lastly, lethal gas is more expensive than electrocution, a factor that states have acknowledged when they have changed execution methods. *See* Denno-II, 82 Iowa L. Rev. at 370-71 & n.298.

Recent trends also suggest that state legislatures may have reached a "sufficient" degree of national consensus in rejecting both lethal gas and electrocution as execution methods. Although the Court has never specified how much of a consensus is considered "sufficient," it has rendered punishments unconstitutional with far less consensus than that shown for lethal gas or electrocution. In *Enmund v. Florida*, 458 U.S. 782 (1981), for example, the Court held the death penalty unconstitutional for some kinds of felony murder, explaining that of the 36 death penalty jurisdictions, "only" 8, "a small minority," allowed capital punishment for such an offense. *Id.* at 792. Furthermore, even if the Court considered along with these 8 states an additional 9 jurisdictions that allowed the death penalty for an unintended felony murder if aggravating circumstances outweighed mitigating circumstances, the Court emphasized that still "*only about a third* of American jurisdictions" would allow a defendant to be sentenced to death for such offenses. *Id.* (emphasis added). The Court noted that even though this trend was not "wholly unanimous among state legislatures . . . it nevertheless weighs on the side of rejecting capital punishment for the crime at issue." *Id.* at 793; *see also* Denno-II, 82 Iowa L. Rev. at 371.

In those cases where the Court has rejected Eighth Amendment challenges to a particular punishment, there have been far more states employing that particular punishment than the number of states employing electrocution. *See, e.g.,*

Stanford v. Kentucky, 492 U.S. 361, 370-71 (1989) (rejecting a challenge to the constitutionality of the death penalty for 16-year-olds, noting that 22 of the 37 death penalty jurisdictions allowed capital punishment for such youths); *Penry v. Lynaugh*, 492 U.S. 302, 334-35 (1989) (rejecting a challenge to the constitutionality of the death penalty for mentally retarded persons, emphasizing that only two states had prohibited it). *See also* Denno-II, 82 Iowa L. Rev. at 371 & n. 306.

Over time, lethal injection has become the overwhelmingly dominant method of execution. *See* App. Tables 5-7, *infra*. Among those inmates executed by either electrocution or lethal injection between 1978-79 and 1998-99, 75% were executed by lethal injection and 25% were executed by electrocution. As the total number of executions from these two methods increased over time (from 1 execution in 1978-79 to 156 executions in 1998-99), the percentage of electrocution executions declined steadily. The percentage of electrocution executions declined rapidly from 1980-81 to 1986-87 (from 100% to 56%), increased briefly in 1988-89 (58%), then declined steadily thereafter. The rapid increase in the percentage of lethal injection executions can be attributed to the fact that the increases over time in the total number of executions was driven largely by increases in lethal injection executions. *See id.*

There are other issues that bear on "evolving standards of decency." For example, apart from the United States, no other country in the world uses electrocution. Of the four remaining states in this country that use electrocution (Alabama, Florida, Georgia, and Nebraska), Florida imposes the most electrocution executions. Since *Gregg*, more than half of the electrocutions in this country, and thus in the world, have taken place in Florida. *See* App. Table 8, *infra*.

Electrocution is also not favored as a method of execution among respondents in recent public opinion polls. Lethal injection is preferred by most, if not the great majority, of respondents. *See* Carla McClain, *Arizona Gas Chamber Stays*, Gannet News Serv., Apr. 7, 1992, *available in* LEXIS, Nexis Library, Wires File (84% favoring lethal injection); George Skelton, *Death Penalty Still Strong in State*, L.A. TIMES, Apr. 29, 1992, at A1, A18 (63% favoring lethal injection). Floridians also have indicated majority support for lethal injection after Davis' execution. *See* Steve Bousquet, *Floridians Favor Move from Electric Chair to Injection, Poll Shows*, Miami Herald, Nov. 8, 1999 (reporting the results of an October, 1999, statewide poll conducted by *The Miami Herald* and *The St. Petersburg Times*, in which 58% of the 600 people questioned supported a state law to replace the electric chair with lethal injection). See also, *Poll: Electric Chair Unpopular in Florida*, OMAHA WORLD-HERALD, Nov. 7, 1999, at 22a.

The Florida Corrections Commission, the body responsible for overseeing Florida's electric chair, has also recommended that Florida change to lethal injection. The Commission's survey of execution methods in other states revealed that "numerous states had recently changed to lethal injection from electrocution because it was considered to be a 'more humane method of execution.'" *Provenzano*, at *25 (Shaw, J., dissenting). Lastly, the Humane Society of the United States and the American Veterinarian Medical Association consider electrocution a wholly unacceptable method of euthanasia for animals.

In *Provenzano*, the Florida Supreme Court failed to address these critical "evolving standards of decency" factors. Clearly, a modern Eighth Amendment analysis of electrocution reveals the court's unjustified conclusion that electrocution is constitutional.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

BRUCE A. GREEN
Louis Stein Professor of Law
Director, Louis Stein Center
for Law and Ethics
Fordham University School of Law
140 West 62nd Street
New York, New York 10023
(212) 636-6851

Counsel of Record

December 1999

APPENDIX

TABLE 1
CURRENT METHODS OF EXECUTION BY STATE*

SINGLE METHOD STATES (28)	
LETHAL INJECTION (24)	**ELECTROCUTION (4)**
Arizona Arkansas California Colorado Connecticut Delaware Illinois Indiana Kansas Kentucky Louisiana Maryland Mississippi Nevada New Jersey New Mexico New York Oklahoma Oregon Pennsylvania South Dakota Tennessee Texas Wyoming	Alabama Florida Georgia Nebraska

CHOICE STATES (10)
INJECTION OR HANGING (3) Montana New Hampshire Washington
INJECTION OR FIRING SQUAD (2) Idaho Utah
INJECTION OR ELECTROCUTION (3) Ohio South Carolina Virginia
INJECTION OR GAS (2) Missouri North Carolina

* Statutory and case law documentation for each state can be found in Denno-II, 82 Iowa L. Rev. at 439-64; KY. REV STAT. ANN. §431.220 (1998); TENN. CODE ANN. § 40-23-114 (1998); *LaGrande v. Stewart*, 173 F.3d 1144 (9th Cir. 1999) (California and Arizona).

TABLE 2
CHANGES IN THE USE OF ELECTROCUTION BY STATE: 1888-1928

YEAR	STATE	HANGING TO ELECTROCUTION	ELECTROCUTION TO LETHAL GAS	ELECTROCUTION TO LETHAL INJECTION
1888	NY	NY		
1896	OH	OH		
1898	MA	MA		
1906	NJ	NJ		
1908	VA	VA		
1909	NC	NC		
1910	KY	KY		
1912	SC VT	SC VT		
1913	AR IN NE OK PA TN	AR IN NE OK PA TN		
1923	AL FL TX	AL FL TX		
1924	GA	GA		
1927	IL	IL		

NO CHANGE IN EXECUTION METHOD

CHANGE IN EXECUTION METHOD

TABLE 3
CHANGES IN THE USE OF ELECTROCUTION BY STATE: 1929-1982

YEAR	STATE	HANGING TO ELECTROCUTION	ELECTROCUTION TO LETHAL GAS	ELECTROCUTION TO LETHAL INJECTION
1929	NM	NM		
1935	CT NC	CT	NC	
1939	SD	SD		
1940	LA MS	LA MS	—	
1949	WV	WV		
1951	OK		OK	
1954	MS		MS	
1955	NM		NM	
1965	VT* WV*			
1977	TX			TX
1982	MA			MA**

NO CHANGE IN EXECUTION METHOD

CHANGE IN EXECUTION METHOD

* Year these states abolished the death penalty.

** Choice states. For example, if a state (e.g., Massachusetts) changes from one execution method (electrocution) to a choice between that method and a new method (a choice between electrocution and lethal injection in 1982), the new method (lethal injection) only is shown in the Table.

TABLE 4
CHANGES IN THE USE OF ELECTROCUTION BY STATE: 1983-1999

YEAR	STATE	HANGING TO ELECTROCUTION	ELECTROCUTION TO LETHAL GAS	ELECTROCUTION TO LETHAL INJECTION
1983	AR IL NJ			AR IL NJ
1984	MA* SD			SD
1990	LA PA			LA PA
1993	OH			OH**
1994	VA			VA**
1995	CT IN NY SC			CT IN NY SC**
1998	KY TN			KY TN

NO CHANGE IN EXECUTION METHOD

CHANGE IN EXECUTION METHOD

* Year these states abolished the death penalty.

** Choice states. For example, if a state changes from one execution method to a choice between that method and a new method, the new method only is shown in the Table.

Note: Statutory and case law documentation for each state in Tables 2-4 may be found in Denno-II, Iowa L. Rev. at 439-64; KY. REV STAT. ANN. §431.220 (1998); TENN. CODE ANN. § 40-23-114 (1998); *LaGrande v. Stewart,* 173 F.3d 1144 (9th Cir. 1999) (California and Arizona).

TABLE 5
NUMBER AND DISTRIBUTION OF ELECTROCUTION AND LETHAL INJECTION EXECUTIONS IN TWO-YEAR INTERVALS: 1976-1999*

YEARS	ELECTROCUTION	LETHAL INJECTION	TOTAL
1976-1977	0	0	0
1978-1979	1 (1.00)	0 (0.00)	1
1980-1981	1 (1.00)	0 (0.00)	1
1982-1983	5 (0.83)	1 (0.17)	6
1984-1985	27 (0.69)	12 (0.31)	39
1986-1987	23 (0.56)	18 (0.44)	41
1988-1989	15 (0.58)	11 (0.42)	26

TABLE 5
CONTINUED*

YEARS	ELECTROCUTION	LETHAL INJECTION	TOTAL
1990-1991	18 (0.50)	18 (0.50)	36
1992-1993	18 (0.28)	47 (0.72)	65
1994-1995	13 (0.15)	72 (0.85)	85
1996-1997	13 (0.11)	104 (0.89)	117
1998-1999	10 (0.06)	146 (0.94)	156
TOTAL (1976-1999)	144 (0.25)	429 (0.75)	573

*From 1976-1999, executions from other methods (hanging, shooting, and lethal gas) constituted 2.71% of the total number of executions.

TABLE 6
NUMBERS OF ELECTROCUTIONS AND LETHAL INJECTIONS: 1976-1999

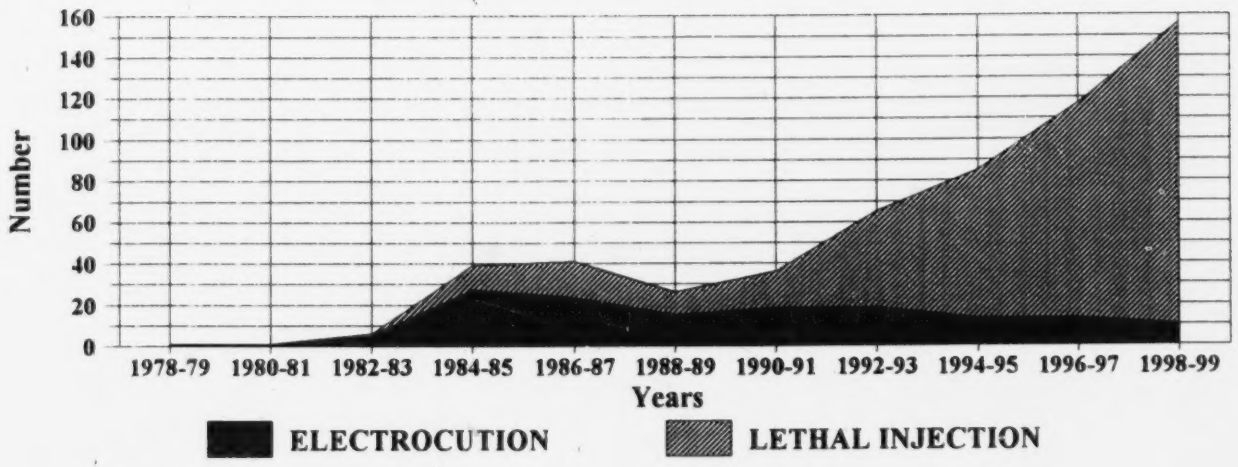


TABLE 7
PERCENTAGES OF ELECTROCUTIONS AND LETHAL INJECTIONS: 1976-1999

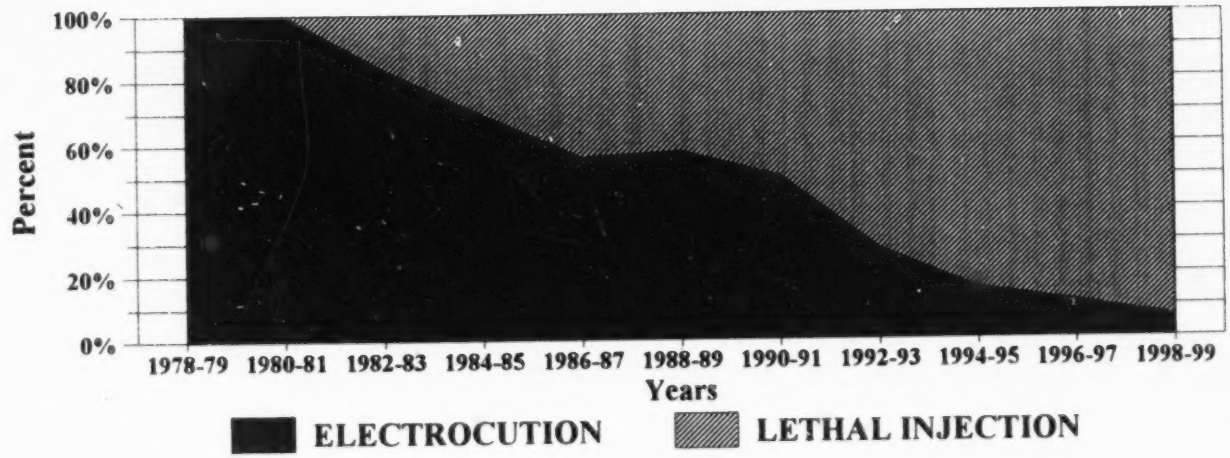
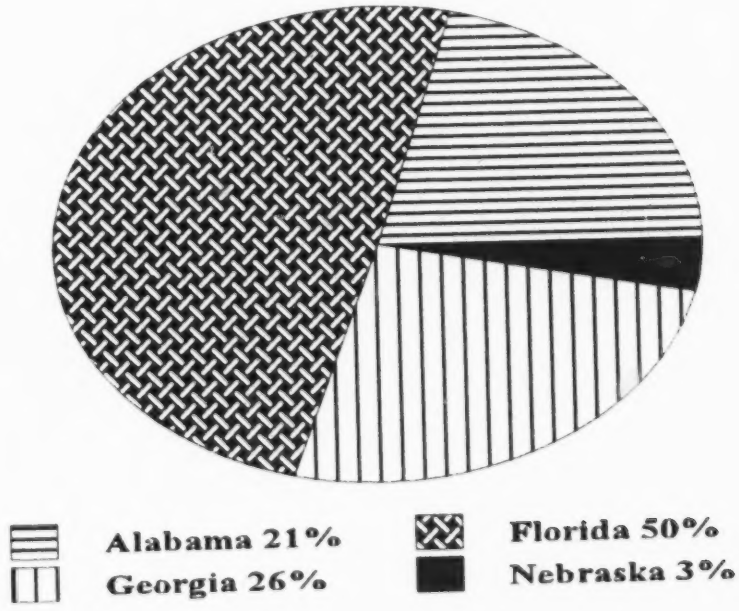


TABLE 8
PERCENTAGES OF EXECUTIONS IN ELECTROCUTION-ONLY STATES: 1976-1999*



*Total number of executions: 89

TABLE 9*
BOTCHED ELECTROCUTION
EXECUTIONS FOLLOWING
***Gregg v. Georgia*, 423 U.S. 153 (1976)**

1. John Spenkelink, May 25, 1979, Florida:
It took three separate jolts of electricity spread over five minutes to kill Spenkelink. After the first jolt, smoke filled the room and a three-inch wound scorched on his right leg.

2. Frank J. Coppola, August 10, 1982, Virginia:
After a second jolt of electrical current, the death chamber filled with the smell and sizzle of burning as Coppola's head and leg burst into flames.

3. John Louis Evans III, April 22, 1983, Alabama:
Three separate jolts over 14 minutes were required to kill Evans. Flames erupted from the electrode tied to his leg, and smoke was seen coming from his head and leg.

4. Robert W. Williams, December 14, 1983, Louisiana:
When the electricity was applied, smoke and sparks appeared from Williams's head. Witnesses reported the smell of "burning flesh" and "excessive burning."

5. Alpha Otis Stephens, December 12, 1984, Georgia:
It took two two-minute jolts of 2,080-volt electricity, eight minutes apart, to kill Stephens. After the first jolt, doctors had to wait six minutes for the body to cool down before examining it. During this time, Stephens took about 23 breaths.

6. William E. Vandiver, October 16, 1985, Indiana:
Indiana's seventy-two year old electric chair took seventeen minutes and five jolts of electricity to kill Vandiver.

7. Alvin Moore, June 9, 1987, Louisiana:
When examined after his execution, Moore was severely burned on the top of his head and his epidermis was found to be missing in a wide circular pattern.

8. Wayne Robert Felde, March 15, 1988, Louisiana:
Felde's body evidenced severe third and fourth degree burns. His leg was mutilated, his skin was coming loose, and "chunks of skin" had been "burned off the left side of his head . . . revealing his skull bone."

9. Horace F. Dunkins, July 14, 1989, Alabama:
An incorrectly wired chair took nineteen minutes to kill the mentally retarded Dunkins.

10. Jesse Joseph Tafero, May 4, 1990, Florida:
For four minutes, the executioner applied three 2,000-volt jolts of electricity, causing flames to shoot from Tafero's head. The medical examiner could not determine whether Tafero survived the first two jolts.

11. Robert T. Boggs, July 19, 1990, Virginia:
Boggs required two fifty-five second applications of 2,500-volts of electricity.

12. Wilbert Lee Evans, October 17, 1990, Virginia:
During the execution, blood poured from Evans's eyes and nose. Witnesses heard an audible moan, suggesting suffering.

13. Derick Lynn Peterson, August 22, 1991, Virginia:
Peterson's death occurred after thirteen minutes and two separate jolts of electricity. After the first series of jolts, Peterson's heart appeared to still be beating.

14. Roger Keith Coleman, May 20, 1992, Virginia:
Executioners applied two 1,700-volt jolts to kill Coleman. A witness spoke of smoke coming from Coleman's leg during the execution.

15. Gregory Resnover, December 8, 1994, Indiana:
When the electricity was applied, Resnover rose suddenly "from his chair in a giant spasm . . . His head jerked back and smoke and spark-like flames came out of the top of his head."

16. Jerry White, December 4, 1995, Florida:
There were reports that White lunged and screamed during his execution.

17. Larry Lonchar, November 14, 1996, Georgia:
Lonchar moaned and "seemed to gasp for air" as the executioner applied two jolts of 2,000 volts each to Lonchar's body before he was pronounced dead.

18. Pedro Medina, March 25, 1997, Florida:
"Blue and orange flames up to a foot long shot from the right side of Mr. Medina's head and flickered for 6 to 10 seconds, filling the execution chamber with smoke."

19. Allen Lee Davis, July 8, 1999, Florida:
After being jolted with 2,300 volts, blood poured from Davis' face, and soaked a large portion of his shirt. Testimony indicated that the strap placed across Davis' mouth hindered his breathing and partially asphyxiated him prior to and during the electrocution.

* Documentation for each blotched electrocution can be found in Denno-I, 35 Wm & Mary L. Rev. at 664-74, and Denno-II, 82 Iowa L. Rev. at 412-24, as supplemented by *Provenzano v. State* (Davis).

(21)

DEC 20 1999 (6)

No. 99-6723

Supreme Court, U.S.
FILED
DEC 20 1999
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

vs.

MICHAEL MOORE, Secretary,
Florida Department of Corrections,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Florida

BRIEF OF THE AMERICAN BAPTIST CHURCHES; AMERICAN FRIENDS SERVICE COMMITTEE; THE AMERICAN JEWISH COMMITTEE; THE AMERICAN JEWISH CONGRESS; THE BAPTIST PEACE FELLOWSHIP OF NORTH AMERICA; THE CHRISTIAN CHURCH (DISCIPLES); THE CONCERNED BLACK CLERGY; JUDY MILLS REIMER AS EXECUTIVE DIRECTOR OF THE CHURCH OF THE BRETHREN GENERAL BOARD; THE EVANGELICAL LUTHERAN CHURCH IN AMERICA; THE NATIONAL COUNCIL OF CHURCHES; CLIFTON KIRKPATRICK AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.); THE REFORMED CHURCH IN AMERICA; THE REORGANIZED CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS; THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE; THE UNITARIAN UNIVERSALIST ASSOCIATION; THE UNITED CHURCH OF CHRIST; AND GENERAL BOARD OF MINISTRIES OF THE UNITED METHODIST CHURCH; AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STEPHEN C. BAYLISS*
THOMAS H. DUNN
303 Elizabeth Street, N.E.
Atlanta, Georgia 30307
(404) 222-9202
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

75pp

QUESTIONS PRESENTED

1. Did the Florida Supreme Court's appraisal of the likelihood that Mr. Bryan will suffer needless agony and degradation when he is put to death by Florida's electric chair violate the Eighth Amendment by disregarding a constitutionally unacceptable risk of physical violence, disfigurement and torment?

2. Did the Florida Supreme Court err in concluding that the record as a whole insufficiently sustains Mr. Bryan's contention that his execution by Florida's electric chair unnecessarily exposes him to physical suffering and degradation in violation of the Eighth Amendment?

3. Following the documented, repeated malfunctioning of Florida's electric chair, resulting in ghastly spectacles of violent disfigurement, did the Florida Supreme Court err in rejecting Mr. Bryan's contention that his being subjected to execution by such means constitutes wanton psychological and moral cruelty that violates the Eighth Amendment?

4. Did the Florida Supreme Court err in determining that the presence or absence of conscious pain once electrocution begins is the only factor which determines whether or not Florida's electric chair constitutes cruel and unusual punishment under the Eighth Amendment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICI CURIAE ... 1

ARGUMENT 10

THERE IS A SOCIETAL MORAL CONSENSUS THAT EXECUTION BY ELECTROCUTION VIOLATES CONTEMPORARY STANDARDS OF DECENCY AND THE BASIC DIGNITY OF HUMANITY AND THUS, IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS 10

A. Religious Groups and Faith-Based Organizations Are Traditionally Relied upon by Framers of Public Policy and Thus, Well Suited to Provide Indicators of Contemporary Standards of Decency 11

B. Executing a Person by Electrocution Is the Gratuitous Infliction of Suffering, Degradation and Mutilation and Is Violative of the Dignity of Humanity and Contemporary Standards of Decency 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Campbell v. Wood, 511 U.S. 1119 (1994) 19

Coker v. Georgia, 433 U.S. 584 (1977)..... 12

Estelle v. Gamble, 429 U.S. 97 (1976) 10, 14

Furman v. Georgia, 408 U.S. 238 (1972)..... 19

Glass v. Louisiana, 471 U.S. 1080 (1985) 15

Gregg v. Georgia, 428 U.S. 153 (1976) 14, 15

In re Kemmler, 136 U.S. 436 (1890).....18, 19

McDaniel v. Paty, 435 U.S. 618 (1978)..... 12

Penry v. Lynaugh, 492 U.S. 302 (1989)..... 10

Provenzano v. Moore, 1999 WL 756012 (Fla. 1999)
..... 15, 16, 17, 18

Rhodes v. Chapman, 452 U.S. 337 (1981) 19

Robinson v. California, 370 U.S. 660 (1962).....15, 19

Trop v. Dulles, 356 U.S. 86 (1958)..... *passim*

Weems v. United States, 217 U.S. 349 (1910) 18

Wilkerson v. Utah, 99 U.S. 130 (1878) 15, 19

CONSTITUTIONAL PROVISIONS

Eighth Amendment 10, 14

Fourteenth Amendment..... 14

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

American Friends Service Committee, "The Death Penalty: The Religious Community Calls for Abolition" (Philadelphia: AFSC, 1998).....1, 13

Hanks, Gardner, *Against the Death Penalty, Christian and Secular Arguments Against Capital Punishment* (Scotsdale: Herald Press, 1997).....1, 13

Eileen W. Linder, ed., *Yearbook of American & Canadian Churches: 1999* (Nashville: Abingdon Press, 1999).....2

Reichley, A.J., *Religion in American Public Life* (Washington, D.C.: Brookings Institute, 1985).....11

STATEMENT OF INTEREST OF AMICI CURIAE

Amici listed and described below are national religious bodies, judicatories, or organizations of the Protestant and Jewish faiths.[1] Amici believe that whatever one may think of the imposition of capital punishment generally, and we oppose it,[2] the notion of executing persons by electrocution violates contemporary standards of decency and the basic dignity of humanity. While Amici endorse many of the arguments presented in Petitioner's and in the other amicus briefs, we present herein additional arguments distinctive to our own interests. Amici are interested in the issue before the Court because of:

(1) a common and traditional calling to be intimately involved with society in positive ways so as to discover and advance the "evolving standards of decency that mark the progress of a maturing society." *Troy v. Dulles*, 356 U.S. 86, 101 (1958), and to help ensure that the criminal justice system reflects those standards;

---

[1] Amici file this brief in support of Petitioner by written consent of all parties pursuant to rule 37.2 of the Rules of the Court and the parties' letters of consent are on file with the Clerk of the Court.

[2] Amici's statements opposing capital punishment are compiled in the following publications: G. Hanks, *Against the Death Penalty, Christian and Secular Arguments Against Capital Punishment* (Scotsdale: Herald Press, 1997); American Friends Service Committee, "The Death Penalty: The Religious Community Calls for Abolition" (Philadelphia: AFSC, 1998).

(2) a recognition that it is Amici's responsibility when the Court explores the national consensus regarding the legal and moral decency of executing persons by electrocution, to provide the Court with the religious community's collective experiences and beliefs which counsels against execution by electrocution; and

(3) united opposition to the imposition of capital punishment, especially by electrocution, because it is cruel and unusual and because capital punishment as it is applied in the United States is contrary to the highest – and even the simplest – moral teachings of our traditions.

Amici are:

1. THE AMERICAN BAPTIST CHURCHES IN THE U.S.A. consists of 5,800 churches with a membership of 1.5 million.[3] In 1958 and 1966, the American Baptist convention, a representative body of the denomination, adopted a resolution, subsequently affirmed by the American Baptist Churches in 1980 and 1982, calling for the abolition of capital punishment, in part based on the conviction that "the emphasis in penology should be upon the process of creative, redemptive rehabilitation, rather than on primitive retribution."

2. THE AMERICAN FRIENDS SERVICE COMMITTEE (AFSC), as an expression of the Religious Society of Friends (Quakers) in America, since 1917 has been active in works of humanitarian relief and service. The AFSC

---

[3] Membership numbers are approximate and have either been provided by the respective *amicus* or taken from Eileen W. Linder, ed., *Yearbook of American & Canadian Churches: 1999* (Nashville: Abingdon Press, 1999).

has a vital interest in this litigation because of Friends' historic and continued opposition to the taking of human life by the State. AFSC embraces the "biblical teaching that every human life is valuable in the sight of God, that man need not remain in his sinful state but can repent and be saved, that God loves the sinner and takes no pleasure in the death of the wicked, but longs that the wicked turn from their ways and live."

3. THE AMERICAN JEWISH COMMITTEE (AJC) is a national organization of approximately 100,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of the AJC that those rights will be secure only when the rights of all Americans are equally secure. AJC opposes the imposition of capital punishment, which it believes is "cruel, unjust and incompatible with the dignity and self respect of humanity."

4. THE AMERICAN JEWISH CONGRESS is an organization of American Jews founded in 1918 to protect the political, civil, religious, and economic rights of American Jews. It believes that those rights are best protected by vigorous enforcement of the Bill of Rights, and that the Constitution must be interpreted in light of the evolving needs of society. It has filed numerous briefs in this Court, including several relating to capital punishment.

5. THE BAPTIST PEACE FELLOWSHIP OF NORTH AMERICA links individuals and congregations throughout the United States, Canada, Puerto Rico and Mexico who believe that "doing justice" and "loving mercy" are intimately tied to "walking humbly with God." Their

quarterly journal, *Baptist Peacemaker*, is circulated to over 8,000 people. The Baptist Peace Fellowship assists a broad constituency in efforts to organize locally, nationally, and internationally on a host of justice, peace, reconciliation and human rights issues. Baptist Peace Fellowship periodicals and publications have on numerous occasions carried articles sharply critical of the use of the death penalty in the United States and in support of restorative justice alternatives.

6. THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST) has over 3,800 churches with a membership of almost 1 million. Since 1962 and most recently in 1985, the General Assembly, a voting representative body of the Church, adopted a resolution opposing the imposition of capital punishment and instead favoring a program of rehabilitation for criminal offenders noting that "the Holy Scriptures clearly mandate that we are not to kill, we are not to render evil for evil, and that we are not to seek retribution with vengeance for the evil done to us."

7. JUDY MILLS REIMER AS EXECUTIVE DIRECTOR OF THE CHURCH OF THE BRETHREN GENERAL BOARD. The Church of the Brethren has affirmed "the sanctity of human life" and opposed capital punishment since 1957. At its Annual Conference in 1987, the Church of the Brethren adopted a statement that "the death penalty only continues the spiral of violence." The statement further noted that "Jesus came with a message of redemption and compassion for life, while the death penalty carries a message of condemnation and death."

8. THE CONCERNED BLACK CLERGY OF METROPOLITAN ATLANTA, INC. (CBC) was conceived in

the mind of a group of socially-conscious African-American pastors fifteen years ago. The organizational meeting was called by Dr. Joseph Lowery, then President of the Southern Christian Leadership Conference and Dr. Cameron Alexander, President of the Georgia General Missionary Baptist Convention. Since its inception, the CBC has evolved into an organization which educates the masses relative to legislative policies which threaten the stability of working class neighborhoods, establishes programs that speak to the plethora of needs and concerns in African-American communities, and creates opportunities for relationship-building between clergy and lay, male and female, Blacks and Whites. CBC is an interfaith, interdenominational, inclusive, non-partisan organization which consciously pursues justice for all of God's people. The CBC opposes capital punishment in any form.

9. THE EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA) is the largest Lutheran denomination in North America and the fifth largest Protestant church body in the United States. The ELCA has approximately 11,000 member congregations, which in turn has approximately 5.2 million individual members nationwide. In its 1991 Social Statement on the Death Penalty, the ELCA urged the abolition of the death penalty. The ELCA believes that "the message conveyed by an execution, reflected in the attention it receives from the public, is one of brutality and violence."

10. THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A. is the preeminent expression in the United States of the movement toward Christian unity. The Council is a "community of communions" composed of 35 national religious bodies in the United

States having an aggregate membership of 52 million. The Council is governed by a Governing Board elected by the member communions in proportion to their size and support of the Council. The Governing Board adopts policy statements and resolutions that express its views on moral and spiritual issues and govern the operation of the program units of the Council. Among these have been three statements in opposition to the death penalty, adopted in 1968, 1976, and 1979. The 1968 Policy statement adopted unanimously, was based in part on the "Christian commitment to seek the redemption and reconciliation of the wrong-doer, which are frustrated by his execution."

11. CLIFTON KIRKPATRICK AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,750,000 active members in 11,500 congregations organized into 174 presbyteries under the jurisdiction of 16 synods. The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statement binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decisions in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members. Since 1959, the Presbyterian Church (U.S.A.) and its predecessor bodies have declared that capital punishment cannot be condoned by an interpretation of

the Christian Bible. General Assemblies since 1959 have continued to declare that capital punishment is " . . . an expression of vengeance which contradicts the justice of God on the cross. . . . " The Stated Clerk urges this Court to find that capital punishment by electrocution violates the Eighth and Fourteenth Amendments to the United States Constitution as well as contemporary standards of decency.

12. THE REFORMED CHURCH IN AMERICA was established in 1628, is the oldest Protestant denomination with a continuous ministry in North America and has a membership of 300,000. The Reformed Church in America opposes "the retention of capital punishment as an instrument of justice," and believes that "capital punishment is incompatible with the spirit of Christ and the ethic of love" and "perpetuates the concepts of vengeance and retaliation."

13. THE REORGANIZED CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS was founded in 1830. The Church's headquarters is in Independence, Missouri, and is established in 37 countries. In 1995, the Standing High Council adopted a statement on the death penalty explaining that "it is a faithful reflection of life and the teachings of Jesus Christ, whom we proclaim, to encourage society not to use capital punishment as a penal response to crime." The statement further declared that "capital punishment of a person convicted of a crime is an unsatisfactory response which demeans and brutalizes society."

14. THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (SCLC) is a non-profit civil rights organization founded in 1957 by Dr. Martin Luther King, Jr. and other civil rights ministers with the stated purpose of redeeming the soul of America by furthering Christian values and upholding the rights of the poor. SCLC has 90 chapters and 50,000 members across the country. Throughout the course of its history, SCLC has conducted workshops and seminars, held rallies and demonstrations and passed resolutions opposing the death penalty. SCLC holds that the death penalty is racially and economically biased and is merely a tool of oppression.

15. THE UNITARIAN UNIVERSALIST ASSOCIATION has over 1,000 congregations in the United States. The Unitarian Universalist Association has opposed capital punishment through its General Assemblies since 1961. Its 1979 General Resolution declared "capital punishment as inconsistent with respect for human life."

16. THE UNITED CHURCH OF CHRIST (UCC) has over 6,000 churches with a membership of 1.4 million. In 1979, the 12th General Synod of the UCC reaffirmed the declarations of earlier Synods in opposition to the death penalty, stating that "opposition is based on our understanding of the Christian Faith and the New Testament's call to redemptive love, mercy, and sanctity of life. . . . " In 1999, the 22nd General Synod, even as public opinion currently is supporting the death penalty, reasserted it opposition to capital punishment.

17. THE GENERAL BOARD OF GLOBAL MINISTRIES OF THE UNITED METHODIST CHURCH is a missional instrument of the United Methodist Church.

Among the varied responsibilities of the General Board of Global Ministries, are 1) "to engage in direct ministries to human need, both emergency and continuing, institutional and noninstitutional, however caused; and 2) to work within societies and systems so that full human potential is liberated and to work toward the transformation of demonic forces which distort life. The United Methodist Church has 36,000 churches with 8.4 million members across the globe. The United Methodist Church has a long history of concern for social justice. Its members have taken forthright positions on controversial issues involving Christian principles. The Social Principles are a prayerful and thoughtful effort to speak to the human issues in the contemporary world from a sound biblical and theological foundation. The Social Principles of the United Methodist Church call for "the creation of genuinely new systems for the care and support of the victims of crime and for rehabilitation that will restore, preserve, and nurture the humanity of the imprisoned;" condemns "torture of persons by government for any purpose" and asserts that torture violates Christian teachings. The 1980 General Conference of the United Methodist Church reaffirmed its opposition to the imposition of capital punishment, stating, "The United Methodist Church cannot accept retribution or social vengeance as a reason for taking human life. It violates our deepest belief in God as the creator and the redeemer of humankind," and in 1984, further stated, "Capital punishment . . . is contrary to our belief that sentences should hold within them the possibility of reconciliation and restoration." The 1996 General Conference of the United Methodist

Church urged that capital punishment be eliminated from all criminal codes.

ARGUMENT

THERE IS A SOCIETAL MORAL CONSENSUS THAT EXECUTION BY ELECTROCUTION VIOLATES CONTEMPORARY STANDARDS OF DECENCY AND THE BASIC DIGNITY OF HUMANITY AND THUS IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

This Court has "held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.' " *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). Moreover, this Court has indicated that contemporary society's attitude toward a particular punishment should be measured by as much objective evidence as possible. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). Amici believe that the moral position of religious and faith-based organizations is an objective factor that this Court should consider in assessing contemporary community standards. An additional factor this Court has considered in deciding whether a punishment violates the "evolving standards of decency" has been whether the alleged form of punishment violated "the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion). All of this the law demands, because of common sense and the teachings of the ages. Amici believe and will show that because of these considerations, there

is a societal and moral consensus that execution by electrocution violates contemporary standards of decency and the dignity of humanity.

A. Religious Groups and Faith-Based Organizations Are Traditionally Relied Upon by Framers of Public Policy and Thus, Well Suited to Provide Indicators of Contemporary Standards of Decency

The religious community traditionally has played a pervasive and dominant role in the formation of the American social conscience. Churches and synagogues have insistently and persuasively called not only upon their own people but also upon all citizens to form a more just and humane society. Not content merely to reflect the mores and prejudices of the imperfect human community, religious leaders – both clergy and lay – have represented, articulated and reflected the impulse of the human spirit towards justice, compassion, and correct conduct. The religious community routinely enlivens and enlightens public debate on matters presenting basic issues in American society. Indeed, since the earliest times, religion has been "woven into the underlying texture of American politics." A.J. Reichley, *Religion in American Public Life* 169 (Washington, D.C.: Brookings Institute, 1985).

Religion's stewardship of moral values has led to new definitions of what is right and wrong in public policy, flowing from insights voiced by emerging religious movements. Religiously inspired movements have been instrumental in many social reforms in the United

States. "[C]hurch and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education." *McDaniel v. Paty*, 435 U.S. 618, 641 n.25 (1978) (Brennan, J., concurring) (quoting L. Tribe, American Constitutional Law, IST ed., 866-67). In short, the religious community frequently speaks to policy-makers about evolving standards of decency, policy-makers listen, and public policy changes.

The central issue presented by the instant cases is also a matter of great social and religious importance – whether there is a societal consensus that it is morally, and thus constitutionally, offensive to execute a person by electrocution. As this Court has insisted, that inquiry must be determined by reference to the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 365 U.S. at 101. The identifying standard

> should not be, or appear to be, merely the subjective views of individual justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to public attitudes concerning a particular sentence. . . .

Coker v. Georgia, 433 U.S. 584, 592 (1977). Amici – religious judicatories, organizations, and agencies of major Protestant and Jewish denominations in the United States – are, as in other areas of public policy, in a unique and important position to reflect public attitudes concerning execution by electrocution.

In the twentieth century, the policy statements of religious bodies in the United States have come to represent the product of a significant and highly developed process that brings together biblical, theological, social science expertise with representative deliberation. The policy statements generally are the result of a long and careful process of study in which experts from theological, ethical and various technical fields, meeting over a period of years with program specialists in the denominations, research a given problem-area, prepare analyses, and draft proposed policies for the religious body. The result of this process is a well-considered and definitive statement combining the contributions of experts and the scrutiny and discussion of a widely-representative deliberative process. As such, it represents a deliberate and informed consensus.

Through such deliberative processes, a large majority of religious bodies or organizations in the United States have expressed their opposition to the imposition of capital punishment in the United States.[4] Amici are

---

[4] In addition to Amici, the following religious bodies and faith-based organizations have expressed their opposition to capital punishment: The Bruderhof Communities, Church Woman United, The Protestant Episcopal Church U.S.A., Fellowship of Reconciliation, The Mennonite Central Committee, The General Conference Mennonite Church, The Moravian Church in America, The Orthodox Church in America, The Union of American Hebrew Congregations, The United States Catholic Conference, and National Board of the Y.W.C.A. G. Hanks, *Against the Death Penalty, Christian and Secular Arguments Against Capital Punishment* (Scotsdale: Herald Press, 1997); American Friends Service Committee, "The Death Penalty: The Religious Community Calls for Abolition" (Philadelphia: AFSC, 1998).

particularly well-suited to inform the Court of the evolving standards of decency in society with regard to the use of electrocution as a means of execution. Amici have acted upon their moral authority and their moral responsibility to take the lead in opposing the death penalty. Our moral opposition comes from many different religious perspectives but coalesces into several core principles: 1) that capital punishment is contrary to the respect for life and the dignity of humanity; 2) that capital punishment is destructive and merely represents retribution, vengeance and retaliation; and 3) that capital punishment is a violent response to violence which demeans and brutalizes society.

B. Executing a Person by Electrocution Is the Gratuitous Infliction of Suffering, Degradation and Mutilation and Is Violative of the Dignity of Humanity and Contemporary Standards of Decency

This Court has determined that the Eighth Amendment prohibition against cruel and unusual punishment "proscribes more than physically barbarous punishments. The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ,' against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society' or which 'involve the unnecessary and wanton infliction of pain.' " *Estelle v. Gamble*, 429 U.S. 97. 102 (citations omitted). "[T]he [Eighth] Amendment has been interpreted in a flexible and dynamic manner." *Gregg v.*

Georgia, 428 U.S. 153, 171 (1976). As concepts of civility and dignity evolve, so do the limits of what constitutes cruel and unusual punishment. *See Trop v. Dulles*, 356 U.S. at 100. Accordingly, issues concerning cruel and unusual must be evaluated "in light of contemporary human knowledge," *Robinson v. California*, 370 U.S. 660, 666 (1962), rather than "in reliance on century-old factual premises that may no longer be accurate." *Glass v. Louisiana*, 471 U.S. 1080, 1083 (1985) (Brennan, J., dissenting from denial of certiorari).

Execution by electrocution is repugnant to contemporary moral "concepts of dignity, civilized standards, humanity, and decency." *Estelle v. Gamble*, 429 U.S. at 102. Death in the electric chair is an especially horrendous, degrading and violent death that always results in mutilation of the human body. *Provenzano v. Moore*, Case No. 95973, 1999 WL 756012, at 19* (Fla.) (Shaw, J., joined by Anstead, J., September 28, 1999, dissenting) ("Not only was every execution in Florida accompanied by the inevitable convulsing and burning that characterizes electrocution, but further, three executions in particular were marred by extraordinary violence and mutilation") (footnote omitted). The pre-execution protocol of shaving the condemned's head and leg are uniquely degrading to this form of execution.[5] The electrical force administered to the condemned's body results in violent convulsions,

---

[5] The Eighth Amendment prohibition against punishments violative of the dignity of man can be violated by the process leading up to an execution. *Wilkerson v. Utah*, 99 U.S. 132, 135 (1878) ("prisoner was drawn or dragged to the place of execution").

thrusting the condemned's body against the chair and the restraining straps. Execution by electrocution results in the burning of the human body which is disfiguring and grotesque. "Halo burns" on the scalp that go as deep as the skull, "arching burns" where the electricity exits and reenters the human body and "drip burns" caused by the superheated saline solutions are characteristic of executions by electrocution. This all occurs when the electrocution goes according to protocol.

The botched execution by electrocution results in even more extraordinary violence and mutilation as evidenced by recent experiences in Florida. Flames spewed from the heads of Pedro Medina and Jesse Tafero. *Provenzano v. Moore*, 1999 WL 756012 at *34 (Pariente, J., joined by Anstead, J., dissenting). The execution of Allen Davis "resulted in a bloody side show – a spectacle more befitting of a 'B' Hollywood movie than a state-sanctioned execution." *Id.* at *34 (Pariente, J., dissenting). Members of the Florida Supreme Court acknowledged that there are substantial risks of continued problems associated with Florida's electric chair. Chief Justice Harding acknowledged that "each time an execution is carried out, the courts wait in dread anticipation of some 'unforeseeable accident' that will set in motion a frenzy of inmate petitions and other filings." *Id.* at *5 (Harding, C.J., joined by Lewis, J., specially concurring). Justice Quince observed that "human error [ ] seems to plague this form of execution." *Id.* at *11 (Quince, J., joined by Wells, J., concurring).

These "ghastly" botched electrocutions only heighten the condemned's psychological suffering "in dread anticipation of some unforeseeable accident" during the

execution process. *Id.* at *5 (Harding, C.J., joined by Lewis, J., specially concurring). The condemned is tortured by fear of the horrific form "the human error that seems to plague this form of execution" will take during his execution. *Id.* at *11 (Quince, J., joined by Wells, J., concurring). Finally, there is no means of measuring the condemned's consciousness and feelings of pain during an electrocution in the electric chair and thus, no way of ensuring that the condemned is unconscious and feeling no pain. The condemned have been observed breathing after the electrical current has ceased. *Id.* at *34 (Pariente, J., dissenting). A method of execution so plagued by human error that it creates an unreasonable risk of pain violates the Eighth Amendment.

Amici are morally compelled to declare that "[e]xecution by electrocution – with its attendant smoke and flames and blood and screams – is a spectacle whose time has passed." *Id.* at *27 (Shaw, J., joined by Anstead, J. dissenting). Execution by electrocution is a punishment that offends the "evolving standards of decency that mark the progress of a maturing society," and is inherently at odds with the basic "dignity of man." *Trop v. Dulles*, 365 U.S. at 100, 101. National and international consensus rejects electrocution as a means of execution that comports with contemporary standards of decency. Only four states have retained electrocution as their sole means of capital punishment. Of the remaining countries in the world that still impose capital punishment, none employ electrocution. Both the Humane Society of the United States and the American Veterinarian Medical Association condemn electrocution as a means of euthanasia for animals. A society that finds the electrocution of

animals to be inhumane and uncivilized cannot condone such treatment of man as acceptable, decent and moral. As this Court has held, the cruel and unusual punishment clause "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910).

In the context of contemporary moral standards, the electric chair is "inhumane and barbarous, – something more than the mere extinguishment of life." *In Re Kemmler*, 136 U.S. 436, 446-7 (1890). Electrocution, more than any other form of capital punishment still in use today, violates contemporary standards of moral decency and is incompatible with the dignity and self respect of man.[6] Electrocution conveys a message of brutality and violence which demeans society, the respect for life and the dignity of man who was created in the image of God. Continued use of the electric chair with its attendant ghastliness only contributes to the "culture of violence." Amici believe that capital punishment, in general, continues the spiral of violence. Continued use of the electric chair gives the perception of actually escalating the spiral of violence. The electric chair also involves "a culture of cruelty ("burn 'em", "fry 'em")" which is contrary to moral standards of decency. *Provenzano v. Moore*, 1999 WL 756012 at *29 (Anstead, J. joined by Shaw, J., dissenting).

---

[6] Amici are morally opposed to capital punishment regardless of the form of execution. We feel compelled nonetheless to voice our moral outrage at the continued use of electrocution as a form of execution. In doing so, Amici are not condoning any other form of execution.

Moreover, the continued use of electrocution perpetuates and accentuates the concepts of retribution, vengeance and retaliation as it is apparent that electrocution has become a cruel, senseless and inhumane punishment "totally without penological justification." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). Amici believe that moral consensus rejects this form of execution.

The prohibition against the gratuitous infliction of suffering, degradation and mutilation is inextricably interwoven in the fabric of morality entertained by contemporary society. Compassion and the inherent dignity of each human person is the heart of religion. Whatever argument is used to support capital punishment, the gratuitous infliction of suffering, degradation and mutilation is "something more than the mere extinguishment of life." *In Re Kemmler*, 136 U.S. 436, 446-7 (1890). As noted by Justice Blackmun, this notion was supported "by our recognition that *painless*, post mortem punishments such as public display, drawing and quartering, and mutilation also violate the Eighth Amendment. *Wilkerson v. Utah*, 99 U.S. 130, 135-136 (1879)." *Campbell v. Wood*, 511 U.S. 1119, ___, 114 S.Ct. 2125, 2127 (1994) (Blackmun, J., dissenting from denial of cert.) (emphasis in original). Amici morally reject execution as a proper punishment in any case and by any means. Nevertheless, we also believe that execution by electrocution is especially morally indefensible as it involves the gratuitous infliction of suffering, degradation and mutilation. Punishments must be judged "in light of contemporary human knowledge." *Robinson v. California*, 370 U.S. 660, 665 (1962). Advances in science may alter the Eighth Amendment analysis of a given punishment. *Furman v. Georgia*, 408 U.S. 238, 430 (1972)

(Powell, J. dissenting) ("no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives"). Amici believe that electrocution, like execution by burning at the stake and postmortem punishments such as public display, drawing and quartering, and mutilation – punishments that were in existence during our colonial era – is incompatible with "the dignity of man" which is the "basic concept underlying the Eighth Amendment." *Trop v. Dulles*, 356 U.S. at 100. Execution by electrocution is cruelty for the sake of cruelty. It makes a spectacle of our justice system and denigrates us as a moral community.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

STEPHEN C. BAYLISS
THOMAS H. DUNN
303 Elizabeth Street, NE
Atlanta, Georgia 30307
(404) 222-9202

DEC 20 1999

No. 99-6723

Supreme Court, U.S.
FILED
DEC 20 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

v.

MICHAEL MOORE, Secretary, Florida Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF PHYSICIANS FOR HUMAN RIGHTS, GLOBAL LAWYERS AND PHYSICIANS, SOCIETY OF GENERAL INTERNAL MEDICINE, AMERICAN NURSES ASSOCIATION AND AMERICAN PUBLIC HEALTH ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

MARTIN J. NEWHOUSE
Counsel of Record
CRYSTAL D. TALLEY
KIMBERLY L. PEDERSEN
ELAINE J. GOLDENBERG
ROPES & GRAY
One International Place
Boston, Massachusetts 02110
(617) 951-7000

Attorneys for Amici Curiae Physicians for Human Rights, et al.

156880

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

24pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interest of the *Amici Curiae*	1
Summary of the Argument	3
Argument	5
I. It Is Undisputed That The Physiological Effects of Electricity are Extremely Painful	5
II. There Is A Substantial Risk That Inmates Remain Conscious For Some Period Of Time During A Judicial Electrocution	8
Conclusion	18

TABLE OF CITED AUTHORITIES

Page

Cases:

Fierro v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994), *aff'd*, 77 F.3d 301 (9th Cir.), *vacated*, 519 U.S. 918 (1996) 13

Jones v. Butterworth, 695 So. 2d 679 (Fla. 1997) ... 3

Jones v. State, 701 So. 2d 76 (Fla. 1997) 3

Poyner v. Murray, 507 U.S. 981 (1993) 6

Provenzano v. Moore, __ So. 2d __, 1999 WL 756012 (Fla. Sept. 24, 1997) 3

Other Authorities:

1993 Report of the AVMA Panel on Euthanasia, 202 JAVMA 230 (Jan. 15, 1993) 4

Arnold Beichman, *The First Electrocution*, 35 COMMENTARY 410 (May 1963) 3

Theodore Bernstein, *Electrical Injury: Electrical Engineer's Perspective and an Historical Review*, ANNALS OF NEW YORK ACADEMY OF SCIENCES, May 1994 17

HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 859 (Eugene Braunwald et al. eds., 11th ed. 1987) 9

Cited Authorities

Page

Nisha Chibber Chandra et al., *Clinical Predictors of Myocardial Damage After High Voltage Electrical Injury*, 18 CRITICAL CARE MED. 293 (1990) 11

MacDonald Critchley, *Electrical Injuries*, LANCET, Nov. 2, 1935 ..... 5, 10

MacDonald Critchley, *Neurological Effects of Lightning and of Electricity*, LANCET, Jan. 13, 1934 17

Martin R. Gardner, *Executions and Indignities - An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96 (1978) 3

IAN GRAY & MOIRA STANLEY, A PUNISHMENT IN SEARCH OF A CRIME (1989) 10

Baiba J. Grube et al., *Neurologic Consequences of Electrical Burns*, 30 J. TRAUMA 254 (Mar. 1990) 11

J.P. Guinard et al., *Myocardial Injury After Electrical Burns: Short and Long Term Study*, 21 SCAND. J. PLAST. RECONSTR. SURG. 301 (1987) 16

C.E. HARTFORD, CARE OF THE CRITICALLY ILL PATIENT (J. Tinker & M. Rapin eds., 1983) 6, 7

Cited Authorities

Page

Harold Hillman, *An Unnatural Way to Die*, 27 NEW SCIENTIST 278 (Oct. 1983) 3, 8, 9

Harold Hillman, *The Possible Pain Experienced During Execution By Different Methods*, 22 PERCEPTION 745 (1993) 5, 6, 11, 12, 13, 17

John L. Hunt et al., *The Pathophysiology of Acute Electrical Injuries*, 16 J. TRAUMA 335 (1976) ... 9

Thomas N. James et al., *Cardiac Abnormalities Demonstrated Postmortem in Four Cases of Accidental Electrocution and Their Potential Significance Relative to Nonfatal Electrical Injuries of the Heart*, 120 AMERICAN HEART J. 143 (July 1990) 12, 15

PRINCIPLES OF NEURAL SCIENCE (Eric R. Kandel et al. eds., 1991) 6

John G. Leyden, *Death in the Hot Seat: A Century of Electrocutions*, WASH. POST, Aug. 5, 1990 ... 3

Sherwin Nuland, *Cruel and Unusual*, N.Y. TIMES, Nov. 9, 1999 4

Bernard M. Patten, *Lightning and Electrical Injuries*, 10 NEUROLOGY OF TRAUMA 1047 (Nov. 1992) 12, 16, 17

A. Sances, Jr. et al., *Electrical Injuries*, 149 SURGERY, GYNECOLOGY & OBSTETRICS 97 (1979) 11, 12

Cited Authorities

Page

V. Garcia-Sanchez & P. Gomez Morell, *Electric Burns: High- and Low-Tension Injuries*, 25 BURNS 357 (Dec. 1998) 9, 10

WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE (1996) 4

Joseph Still et al., *Electrocution Due to Contact of Industrial Equipment with Power Lines*, 23 BURNS 573 (1997) 11

NEGLEY K. TEETERS, HANG BY THE NECK (1967) 15

HANDBOOK OF CLINICAL NEUROLOGY (P.J. Vinken & G.W. Bruyn eds., 1975) 5, 17

INTEREST OF THE *AMICI CURIAE*[1]

Physicians for Human Rights is an organization of health professionals, scientists, and concerned citizens that uses the knowledge and skills of the medical and forensic sciences to investigate and prevent violations of international human rights and humanitarian law. In addition to its various initiatives, Physicians for Human Rights works to prevent medical complicity in torture and other abuses. Physicians for Human Rights conducts educational training projects for health professionals, members of the judiciary, and human rights advocates on the application of medical and forensic skills in the investigation of violations of human rights. In recognition of its accomplishments, Physicians for Human Rights shared in the 1997 Nobel Peace Prize for its work on the steering committee of the International Campaign to Ban Landmines.

Global Lawyers and Physicians works to protect the human rights and dignity of all persons. Its goal is to provide support and assistance in developing, implementing, and advocating public policies and legal remedies that protect and enhance human rights in health. Global Lawyers and Physicians also co-directs the Boston Center for Refugee Health and Human Rights, whose mission is to prevent torture and aid survivors of torture.

The Society of General Internal Medicine is an international organization of physicians and others who

1. Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, the *amici curiae* state that no counsel for either party has authored this brief in whole or in part and no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

combine caring for patients with education and research. It is dedicated to improving patient care, education, and research in general medicine, as well as to promoting social responsibility.

The American Nurses Association ("ANA") is an association of registered nurses that is dedicated to the advancement of the goals and interests of registered nurses and of the nursing profession generally. It was founded in 1897 to promote the professional and educational advancement of nurses. The ANA represents approximately 185,000 nurses in the United States and its territories through its 54 constituent member organizations. The ANA establishes professional standards for nursing practice, nursing education, and nursing services as well as a code of ethical conduct for nurses.

The American Public Health Association ("APHA") is a national non-profit organization devoted to the promotion and protection of personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing over 50,000 public health professionals. It represents all disciplines and specialties in public health.

The *amici* are familiar with the medical evidence relevant to whether the electrocution process causes intense pain, and are concerned about the risk of a prolonged, torturous death. Because an informed discussion of this evidence will illuminate the question presented to the Court, the *amici* are filing this brief to aid the Court's resolution of this case.

SUMMARY OF THE ARGUMENT

From its first use in 1890 in New York to the present, electrocution as a method of judicial execution has been described repeatedly as "torture," akin to medieval methods such as boiling in oil. *See, e.g.*, Arnold Beichman, *The First Electrocution*, 35 COMMENTARY 410, 415-18 (May 1963); John G. Leyden, *Death in the Hot Seat: A Century of Electrocutions*, WASH. POST, Aug. 5, 1990, at D05 ("The New York Herald called the execution [in 1890] 'death by torture.' "); Harold Hillman, *An Unnatural Way to Die*, 27 NEW SCIENTIST 278, 278 (Oct. 1983) ("He feels himself being burnt to death. . . . It must feel very similar to the medieval trial by ordeal of being dropped into boiling oil.").

While there is no dispute that application of an electrical current of the magnitude used in a judicial electrocution affects the body in ways that would ordinarily cause tremendous pain, what is disputed is whether the inmate suffers no pain due to immediate brain death. However, no study definitively shows that intentional electrocution causes immediate brain death. *See* R2. at 705.[2] Because of a lack of research, there is in fact no scientifically valid data to support the claims advanced in favor of electrocution as an immediate and painless means of execution. *See* Martin R. Gardner, *Executions and Indignities - An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 125 (1978); Hillman, *An Unnatural Way to Die*, *supra*, at 278 (noting that "[t]here is no reason whatsoever to believe that the condemned person does not

2. Citations to "R1." refer to the April 1997 hearing in *Jones v. Butterworth*, 695 So. 2d 679 (Fla. 1997). Citations to "R2." refer to the July 1997 hearing in *Jones v. State*, 701 So. 2d 76 (Fla. 1997). Citations to "R3." refer to the July 1999 hearing in *Provenzano v. Moore*, __ So. 2d __, 1999 WL 756012 (Fla. Sept. 24, 1997).

suffer severe and prolonged pain"). The reason for the lack of research is simple: conducting such research on human beings would amount to torture. *See* R2. at 422. In fact, ironically, research on this method of electrocution is not even conducted on animals, because it is considered inherently cruel.[3] *See* WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE 163 (1996). Because studies of the onset of death and/or unconsciousness during judicial electrocution cannot be conducted, it is impossible to establish with any degree of medical or scientific certainty the truth of the claim that electrocution provides an instant and painless death.

To the contrary, to the extent that scientific data is available despite a dearth of direct research, the medical and scientific literature and the expert testimony in this case strongly support the proposition that death by electrocution, even when carried out without technical failure or mistake,[4] can be quite the opposite: an unreasonably prolonged and torturous experience.

---

3. When animals are euthanized by electrocution, "[i]t is imperative that [they] be unconscious before being electrocuted" because "animals do not lose consciousness for 10 to 30 seconds or more after onset of cardiac fibrillation," the ultimate cause of death. *1993 Report of the AVMA Panel on Euthanasia*, 202 JAVMA 230, 241 (Jan. 15, 1993).

4. Because it is the *amici*'s position that, "[e]ven when functioning exactly as it should, the electric chair is a brutal killer," Sherwin Nuland, *Cruel and Unusual*, N.Y. TIMES, Nov. 9, 1999, this brief does not address the question of so-called "botched" electrocutions, in which the electric chair does not function as intended due to technical failures or human error. Such cases are well documented, as is the suffering inflicted upon inmates in such instances.

ARGUMENT

I. It Is Undisputed That The Physiological Effects of Electricity are Extremely Painful

It cannot be disputed that the magnitude of electricity applied in a judicial electrocution necessarily affects the body in ways that would cause excruciating pain under normal circumstances.[5] As noted by Dr. Harold Hillman, one of the few researchers to publish on the topic of the pain caused by judicial electrocution, medical evidence suggests that judicial electrocution is quite painful. *See* Harold Hillman, *The Possible Pain Experienced During Execution By Different Methods*, 22 PERCEPTION 745, 750 (1993) (concluding that judicial electrocution would be a painful method of execution, citing evidence that defibrillation is painful, electric burns are painful, electricity is used for torture, and a survivor of the electric chair felt pain). A seminal work on electrical injuries reports that when high-voltage electrical accidents do not cause instantaneous unconsciousness, the victim almost always experiences "an agonizing pain throughout the body." MacDonald Critchley, *Electrical Injuries*, LANCET, Nov. 2, 1935, at 1002, 1003. *See also* HANDBOOK OF CLINICAL NEUROLOGY 686 (P.J. Vinken & G.W.

5. Florida employs an automatic five-cycle electrocution method that lasts for two minutes. *See* R1. Vol. 8 at 157. Between 2250 and 2350 volts are applied during the first cycle, which lasts for eight seconds. *See* R1. Vol. 5 at 133. One thousand volts are applied during the second cycle, which lasts for twenty-two seconds. *See id.* at 134. Both the eight-second "high" cycle and the twenty-two-second "low" cycle are repeated, followed by a final high cycle of sixty seconds. *See* R1. Vol. 8 at 157. Although the system is set to go through all five cycles automatically, according to the record below in practice the cycles are always stopped manually four seconds into the third cycle. *See id.* at 184-88.

Bruyn eds., 1975); Hillman, *The Possible Pain Experienced*, *supra*, at 750. As the current travels through the body, it causes every muscle to violently and completely contract, which is an enormously painful experience. *See* Affidavits of E.B. Ilgren, M.D. ¶20 (hereinafter "Ilgren Aff.") and Dr. Harold Hillman ¶12 (hereinafter "Hillman Aff."), previously submitted to the Court in *Poyner v. Murray*, 507 U.S. 981 (1993) (denial of petition for stay of execution). The contractions can cause the limbs to move violently against the straps, which may result in dislocations or fractures. *See* Hillman, *The Possible Pain Experienced*, *supra*, at 747. *See also* C.E. HARTFORD, CARE OF THE CRITICALLY ILL PATIENT 690 (J. Tinker & M. Rapin eds., 1983). Furthermore, electrical current at the level used in judicial electrocutions causes the body's temperature to rise, heating the body fluids close to the boiling point of water and causing painful swelling of the internal organs. *See* Ilgren Aff. ¶21; Hillman Aff. ¶12. In addition, the high-voltage electrical current applied during a judicial electrocution causes second- and third-degree burns, which would be excruciatingly painful. *See* HANDBOOK OF CLINICAL NEUROLOGY, *supra*, at 720; Ilgren Aff. ¶19. *See also* CARE OF THE CRITICALLY ILL PATIENT, *supra*, at 686. The painful nature of these burns is evidenced by the fact that patients who receive such severe burns and survive are regularly treated with powerful pain reduction medication.[6] *See* Hillman Aff. ¶11.

---

6. Indeed, when tissues are damaged, as with an electrical burn, the sensation of the pain in response to subsequent exposure to the stimulus can be increased. *See* PRINCIPLES OF NEURAL SCIENCE 386 (Eric R. Kandel et al. eds., 1991). That is, the threshold for pain at that location is reduced, and the area becomes hyper-sensitive to pain. *See id.*

As the current travels through the body inflicting the physical pain described above, it can also cause the sensation of pain by directly activating the pain-sensing regions of the brain. Although pain ordinarily is caused by the application of a pain-causing stimulus to a body part, the sensation of pain can also be produced by applying a certain quantum of electrical current to the areas of the brain responsible for sensation of pain. *See* R2. at 372. For example, if an electrical current is applied to the brain cells responsible for sensing pain in the foot, a person will feel pain in the foot, even if there is no external stimulation to the foot causing pain. *See* R3. at 437. Amputees often experience such "phantom limb pain" when the area of the brain responsible for sensing pain in the previously amputated limb is activated. *See id.* Because the regions of the brain that control the sensation of pain are located deep within the brain and thus are protected from the source of the current, it is unlikely that they are instantly destroyed by the initial application of electricity during a judicial electrocution. *See* R3. at 438-39.[7] It is more likely that weaker current reaches the deeper areas of the brain, because electrical current has a tendency to spread out to fill the available space, resulting in current dissipation. *See* CARE OF THE CRITICALLY ILL PATIENT, *supra*, at 682.[8] If only weaker current does reach

7. In addition to the fact that these regions are removed from the source of the current, they are also protected by the skull, which resists the flow of the electrical current. *See infra* pp. 9-10 for a discussion of this point.

8. This concept is known as current density. A given amount of current concentrated in a small area has a higher density than the same amount of current concentrated in a larger area. *See* R3. at 560. As the State's expert conceded, the spreading out of current could be a significant factor in assessing the effect of electrical current on the body. *See* R2. at 1028.

those areas, the pain-sensing regions of the brain are likely activated, *see* R2. at 379, 406, which, in and of itself, would cause the inmate to experience intense pain.

It is important to note that an absence of outward signs of pain from an inmate during a judicial electrocution is hardly evidence that the inmate is not experiencing severe pain. The more likely explanation for a lack of expression is that the manifestations of pain are hidden by the nature of the procedure. *See* Hillman, *An Unnatural Way to Die*, *supra*, at 278. For one thing, the inmate is strapped to the chair at the arms, legs and chest, and a mask covers his head. Further, though it was once believed that a failure to move indicated a lack of pain, it is now known that such a failure could be due to the fact that the muscles are contracted maximally, preventing the inmate from expressing or conveying that pain. *See* Hillman Aff. ¶12. The muscle contraction itself is excruciatingly painful, and is added to the pain of the burning flesh and the heating of the organs as described above. *See id.* The end result is that the inmate "feels himself being burnt to death while he is conscious of his inability to breathe." Hillman, *An Unnatural Way to Die*, *supra*, at 278.

II. There Is A Substantial Risk That Inmates Remain Conscious For Some Period Of Time During A Judicial Electrocution

Though it is undisputed that severe burning of the skin, massive contraction of the muscles, and rapid heating of the internal fluids could result in great pain under normal circumstances, the question at the core of the present debate is whether the inmate being executed by electrocution is conscious, or sufficiently conscious, so as to experience that pain. The precise instant at which consciousness is lost when

electricity is applied to the human body is necessarily on the edge of the unknowable. *See* Hillman Aff. ¶12 (stating that "[a]lthough it is believed by proponents of death by electrocution that the person being electrocuted may lose consciousness and the sensation of pain as soon as electrocution begins, there is no scientific evidence whatsoever to support this belief"); R2. at 655, 743. However, there is *no* evidence that the magnitude of electricity applied during a judicial electrocution necessarily causes immediate brain death, such that pain and suffering are not experienced. *See* Hillman, *An Unnatural Way to Die*, *supra*, at 278; Ilgren Aff. ¶23; Hillman Aff. ¶10; R2. at 677.

During a judicial electrocution it is likely that the magnitude of current that reaches the deep recesses of the brain where the centers of consciousness are located is not sufficient to cause instantaneous unconsciousness. *See* R2. at 385. Electricity tends to follow the path of least resistance, *see* R3. at 485, and there are several layers of highly resistant material between the electrode and the brain. Specifically, between the head electrode and the brain, resistance will be encountered in the skin, the tissue, and the skull. The human skull is likely the most resistant substance in the body, *see* John L. Hunt et al., *The Pathophysiology of Acute Electrical Injuries*, 16 J. TRAUMA 335, 339 (1976) ("Bone has the greatest resistance to current flow of any tissue in the body. . . ."), and can effectively insulate the brain from current, *see* V. Garcia-Sanchez & P. Gomez Morell, *Electric Burns: High- and Low-Tension Injuries*, 25 BURNS 357, 358 (Dec. 1998); HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 859 (Eugene Braunwald et al. eds., 11th ed. 1987) (noting that bone offers relatively high resistance); Ilgren Aff. ¶15. Studies have shown that

the amount of electrical current that actually crosses the skull is 1/20th of the initial current.[9] *See* Hillman Aff. ¶9; R2. at 395. The current that does ultimately penetrate the skull will then encounter the highly conductive cerebral spinal fluid. *See* Critchley, *Electrical Injuries*, *supra*, at 1002 (noting that the best conductive material in the body is cerebral spinal fluid); Garcia-Sanchez, *supra*, at 358; PRINCIPLES OF INTERNAL MEDICINE, *supra*, at 859; R2. at 399. The presence of such fluid will likely divert the current *around* the brain and into the spinal canal. *See* R2. at 399. That significantly smaller amounts of current reach the brain is supported by observations that "[t]he burns appearing inside the scalp are minute compared with those on the skin's surface." Hillman Aff. ¶9. *See also* R2. at 922 ("[Medina's] scalp exhibited the central area of charring . . . but the bone itself was not burned through. In fact, it was not even partially burned."). As a result, it is more likely than not that inmates are not rendered immediately unconscious, *see* R2. at 674-76, 749, and, in fact, consciousness is likely to last for a period of time, *see* R2. at 438. Even Nikola Tesla, the inventor of alternating current, believed that death by judicial electrocution is not instantaneous, stating that alternating current would spread through the body in a manner that could preserve vital organs, "with the result the victim may retain consciousness and experience great pain." IAN GRAY & MOIRA STANLEY, A PUNISHMENT IN SEARCH OF A CRIME 32 (1989).

As no studies have ever measured the brain's electrical activity during an electrocution, *see* R2. at 677, accidental electrocutions and lightning strikes provide the closest

9. The studies have measured movement of current from the inside of the skull to the outside. *See* R3. at 447. However, there is no reason to believe that the movement of current from the outside of the skull to the inside would be different. *See id.*

analogue. Although loss of consciousness does occur after many high-voltage electrical accidents, the medical and scientific literature reports that loss of consciousness is by no means a certainty. Various studies have shown that anywhere from 40% to 55% of patients studied remained conscious after high-voltage accidents with electricity ranging from 3000 to 130,000 volts, a range far exceeding the voltage used in a judicial electrocution. *See* Nisha Chibber Chandra et al., *Clinical Predictors of Myocardial Damage After High Voltage Electrical Injury*, 18 CRITICAL CARE MED. 293, 295 (1990) (explaining that nine out of thirteen patients remained conscious after contact with voltage ranging from 3000 to 130,000 volts); Baiba J. Grube et al., *Neurologic Consequences of Electrical Burns*, 30 J. TRAUMA 254, 255 (Mar. 1990) (stating that 55% of patients studied remained conscious after high-voltage accident); Joseph Still et al., *Electrocution Due to Contact of Industrial Equipment with Power Lines*, 23 BURNS 573, 573 (1997) (stating that seven patients survived and remained conscious when industrial equipment they were touching contacted high-voltage power lines).

If consciousness is retained for some period of time during a judicial electrocution, the mechanisms of death in such cases indicate that consciousness — and thus the sensation of pain — can be more prolonged than is argued by the procedure's advocates. Asphyxiation and ventricular fibrillation are believed to be the primary mechanisms of death in a judicial electrocution. *See* Hillman Aff. ¶13 ("Death results from the cessation of respiration and the heart as well as a cessation of brain functioning."); Hillman, *The Possible Pain Experienced*, *supra*, at 748 ("Death from electrocution could be due to asphyxia caused by paralysis of respiration, and to ventricular fibrillation."). *Cf.* A. Sances,

Jr. et al., *Electrical Injuries*, 149 SURGERY, GYNECOLOGY & OBSTETRICS 97, 99 (1979). Laryngeal asphyxia results when the muscles of the larynx contract and close off the airway to the lungs. *See* Ilgren Aff. ¶24. This mechanism of death is similar to death by strangulation, with death ultimately taking several minutes. *See id.* General asphyxia results when the muscles of the chest contract and prevent the lungs from being able to expand to take in air. *See id.* Once the oxygen supply is cut off in this way, death may take up to several minutes to occur. *See id.* Finally, death by ventricular fibrillation results when the heart ceases functioning,[10] *see id.*, and an individual can remain conscious for upwards of twenty to thirty seconds after its onset, *see* Hillman, *The Possible Pain Experienced, supra*, at 748 ("[S]everal seconds or minutes could elapse during which the condemned person could be conscious." (citations omitted)); R2. at 96, 438.

---

10. It is important to note, though, that while electrical current can fibrillate the heart and cease blood flow, high levels of electrical current can also have the opposite effect. *See* Thomas N. James et al., *Cardiac Abnormalities Demonstrated Postmortem in Four Cases of Accidental Electrocution and Their Potential Significance Relative to Nonfatal Electrical Injuries of the Heart*, 120 AMERICAN HEART J. 143 (July 1990) ("Paradoxically, the effects of electrical current upon the heart can be lifesaving as well as the cause of death, and the difference in the end result depends upon relatively small differences of circumstances."). This is the theory behind an emergency room defibrillator. If the heart were in fibrillation, then the application of anywhere between 5 and 15 amps of current could cause defibrillation and "restart" the heart with a normal heartbeat. *See* R3. at 594. *See also* R3. at 681 (stating that there is an "upper limit of vulnerability" whereby an electric shock exceeding a certain threshold will not cause fibrillation). In fact, one scientist reports that judicial electrocutions have shown that alternating current of 5 to 8 amps can pass through the body without causing permanent arrest of the heart. *See* Bernard M. Patten, *Lightning and Electrical Injuries*, 10 NEUROLOGY OF TRAUMA 1047, 1054 (Nov. 1992).

The evidence suggests that the contention that unconsciousness is *always* instantaneous when an inmate is electrocuted is wrong. To being with as the State's own expert conceded below, consciousness itself can be difficult to determine by mere observation. *See* R2. at 1045. This fact has long been recognized. For example, when the trial court in *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994), *aff'd*, 77 F.3d 301 (9th Cir.), *vacated*, 519 U.S. 918 (1996), concluded that execution by use of the gas chamber was cruel and unusual, it commented extensively on difficulties encountered in the observation of consciousness and pain in individuals. The court stated that neither pain nor consciousness is easy to assess. *See id.* at 1400. It further noted that even a physician could not be certain that a person is unconscious "unless that person is completely flaccid, with no body movements," *id.*, and that even if one displayed those characteristics of unconsciousness, there could still be a response to a painful stimulus, *see id.* at 1400 n.9. Even when a person is conscious, the court concluded, it can be difficult to assess the presence and the extent of pain. *See id.* at 1400. Thus, in a judicial eletrocution, while the prisoner may appear unconscious because he may be paralyzed by the current's effects on the muscles and restrained by the straps and mask, this appearance does not remove the risk that he is conscious and sentient for some period of time. *See* Hillman, *The Possible Pain Experienced*, *supra*, at 751; Hillman, *An Unnatural Way to Die*, *supra*, at 278.

The conclusion that unconsciousness occurs instantaneously depends upon the validity of the assumption that the electrical current applied in a judicial electrocution causes immediate and permanent depolarization of the brain, which deprives the brain cells of the ability to return to their polarized state, thereby ultimately leading to death.[11] While it

11. The brain consists of billions of nerve cells which have a positive electrical charge on the outside, and a negative electrical (Cont'd)

is true that intense and prolonged depolarization can cause cell death, *see* R2. at 425, "[it is] extremely unlikely that [the initial current surge in a judicial electrocution] would permanently and instantly depolarize the brain," R2. at 376. *See also* R2. at 674 ("With a degree of medical certainty, I do not believe the brain is instantly, simultaneously depolarized as the current is applied."). If the brain instantly and permanently depolarized, then the State "should be able to give the current for less than one second and be done with it." R2. at 710-11. However, Florida procedure calls for a five-cycle method that can last for as long as two minutes. *See* R1. V8. at 157. Such a procedure hardly seems consistent with, and indeed contradicts, the assumption that the brain is instantly, permanently, and fatally depolarized by the initial application of electrical current.[12]

(Cont'd)
charge on the inside. *See* R3. at 427. When the outside of the cell becomes negatively charged, depolarization, a normal brain function necessary for the perception of external stimuli, occurs. *See* R3. at 427; R2. at 658. After depolarization, the cell gradually returns to its normal state of external positive charge and internal negative charge (*i.e.*, it becomes repolarized). Depolarization can be caused by either the direct application of electricity to the brain, or by the release of a chemical from peripheral nerves, like those in the hand, when a sensation is encountered. *See* R3. at 427. In its normal occurrence in daily life, the ultimate result of depolarization is the firing of an impulse known as an action potential, which is necessary to experience everyday sensations such as light, sound, and pain. *See* R2. at 372.

12. The fact that some states have subjected inmates to a second round of electric cycles when the first round did not cause death is also evidence that there is no certainty that death is instantaneous. *See* R2. at 745.

Despite an attempt by the State to control the path of current in a Florida electrocution by placing electrodes on the head and leg, is that the path of electrical current cannot be controlled once it enters the body, and so a particular amount of electrical current cannot be guaranteed to reach and incapacitate a particular vital organ. *See* R2. at 558-60. According to the inventor of alternating current, the result of a lack of control of the current path when conducting a judicial electrocution is that "[t]he alternating current used . . . does not pass in a direct course, despite all the precautions taken. The current flows along a restricted path into the body and destroys all tissues confronted in this path. . . . In the meantime the vital organs may be preserved . . . ." NEGLEY K. TEETERS, HANG BY THE NECK 448 (1967) (quoting Nikola Tesla) (internal quotation marks omitted).

One indication that the brain continues to function after the application of electrical current is that the heart has been shown to continue functioning. Like the brain, the heart functions on the basis of electrical impulses. *See* James et al., *supra*, at 148 (stating that the heart "has among its special characteristic properties the production and distribution of electrical currents"); R2. at 383. Though it is true that the heart can beat despite a lack of brain function, several experts have noted that the continued activity of the heart after the application of the current in a judicial electrocution strongly suggests that the brain could continue to function, given the extensive protection provided to the brain by the skull and cerebral-spinal fluid, and the lesser protection available to the heart. *See* R3. at 433-34. Because of the extensive protection available to the brain by virtue of the skull, there is no reason to believe that the brain receives more electrical current than the heart. *See* R3. at 434. According to one expert, "[i]t would be possible [to exhibit an agonal pulse even though the brain has been totally destroyed]

. . . but . . . if that much current reaches the brain, there should be sufficient current to reach the heart to cause fibrillation of the heart or cardiac standstill. There's an incompatibility here which is not explained by the electrical engineers." R2. at 216. *See also* R2. at 383-84 ("If judicial execution does not terminate the beating of the heart immediately or throughout the minute of the current application, then there is no reason to think that the same current will stop the electric chemical activity of the brain which also relies on impulse activity. . . ."). Thus, the pulses palpated after the electrocutions of Medina and Tafero, which indicate that their hearts were still capable of electrical activity, suggest that their brains may still have been functioning. *See* R3. at 433. This, in turn, obviously suggests that consciousness persists during a judicial electrocution.

Industrial accidents and lightning strikes provide evidence that it cannot be concluded with scientific or medical certainty that the brain is instantly and permanently depolarized during a judicial electrocution. Such accidents can involve voltages in excess of ten thousand volts. One expert who treated such patients testified that their brains and hearts were not instantly destroyed, though they did sustain massive and severe burns. *See* R2. at 679. In addition, the medical and scientific literature documents the survival of high-voltage electrical shock victims. In one study of ten patients who were either struck by lightning (which reaches one million volts) or who received electric shocks ranging from 16,000 to 60,000 volts, all the victims survived. *See* J.P. Guinard et al., *Myocardial Injury After Electrical Burns: Short and Long Term Study*, 21 SCAND. J. PLAST. RECONSTR. SURG. 301, 302 (1987). Another study reports that 70% of lightning strike victims survived, despite amperage ranging from 25,000 to 500,000 amps and temperatures exceeding 5000 degrees Fahrenheit. *See* Bernard M. Patten, *Lightning*

and Electrical Injuries, 10 NEUROLOGY OF TRAUMA 1047, 1048 (Nov. 1992). Yet another study notes that less than 25% of victims die from lightning strikes each year. *See* Theodore Bernstein, *Electrical Injury: Electrical Engineer's Perspective and an Historical Review*, ANNALS OF NEW YORK ACADEMY OF SCIENCES, May 1994, at 1, 8. These examples support a conclusion that brain function is not invariably instantaneously destroyed by electrocution and that, to the contrary, in some if not all cases brain function — and therefore perhaps consciousness — also persists for some period after the initial application of electricity.

Further, not only is it possible for people to remain conscious during a judicial electrocution, it is also possible that the perception of time during an electric shock is altered, such that a few seconds feels like several minutes. *See* HANDBOOK OF CLINICAL NEUROLOGY, *supra*, at 698 ("There are numerous references in the literature to the apparent slowing down of time under the influence of the [electrical] current."); MacDonald Critchley, *Neurological Effects of Lightning and of Electricity*, LANCET, Jan. 13, 1934, at 68, 70 (explaining that "[a]s with most protracted painful experiences, the sufferer usually feels that the passage of time is inordinately slow, and electrical injuries supply one of the most vivid examples of the prolongation of time"). Furthermore, one must consider that "reaction times — which include the time that motor signals take to go from the brain to the periphery — are maximally up to 1 [second], whereas the blood and oxygen supply last several seconds. Thus there will always be a finite, if variable, number of seconds during which a condemned person feels before he or she becomes unconscious." Hillman, *The Possible Pain Experienced*, *supra*, at 750.

In sum, based on the scientific and medical evidence, a substantial risk exists that the inmate will retain consciousness for some period of time after the initial application of electricity, during which time the inmate will experience intense pain.

CONCLUSION

Based on the evidence discussed above, a substantial risk exists that death and unconsciousness will not be immediate when a judicial electrocution is performed, that the inmate will retain consciousness for some period of time and will experience for that period the intense pain caused by exposure to a massive electrical charge. It is the *amici curiae*'s position that this risk is unreasonable and unacceptable and renders electrocution a brutal and inhumane procedure that should be banned as unconstitutional by this Court.

Respectfully submitted,

MARTIN J. NEWHOUSE
Counsel of Record
CRYSTAL D. TALLEY
KIMBERLY L. PEDERSEN
ELAINE J. GOLDENBERG
ROPES & GRAY
One International Place
Boston, Massachusetts 02110
(617) 951-7000

Attorneys for Amici Curiae
Physicians for Human Rights, et al.

Dated: December 20, 1999

(8)

DEC 20 1999

No. 99-6723

Supreme Court, U.S.
FILED
DEC 20 1999
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

v.

MICHAEL MOORE, Secretary,
Florida Department of Corrections,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

EDWARD M. CHIKOFSKY
Counsel of Record
301 East 87th Street
New York, NY 10128
(212) 289-1062

BARBARA E. BERGMAN
UNM School of Law
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

Counsel for Amicus Curiae

1780

CAPITAL CASE

QUESTION PRESENTED

Whether, in light of contemporary scientific knowledge and presently available alternatives, execution of a death sentence by electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution.

TABLE OF CONTENTS

Interest of *Amicus Curiae* 1

Statement of the Case 1

Summary of Argument 4

ARGUMENT:

Execution By Electrocution Is Cruel And Unusual Punishment Insofar As It Constitutes The Unnecessary And Wanton Infliction of Pain, Violates Human Dignity And Is Contrary To Evolving Standards Of Decency In Light Of Humane Medical Alternatives And Contemporary Public Consensus 5

A. The Unnecessary and Wanton Infliction of Pain 7

B. The Offense to Human Dignity 8

C. Standards of Decency and Legislative Trends 10

Conclusion 12

TABLE OF AUTHORITIES

Cases

Coker v. Georgia, 433 U.S. 584 (1977) 10

Enmund v. Florida, 458 U.S. 782 (1982) 10

Estelle v. Gamble, 429 U.S. 97 (1976) 5

Furman v. Georgia, 408 U.S. 238 (1972) 6

Glass v. Louisiana, 471 U.S. 1080 (1985) 3

Gregg v. Georgia, 420 U.S. 153 (1976) 5

Hudson v. McMillan, 501 U.S. 1 (1992) 6

Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) 5

In re Kemmler, 136 U.S. 436 (1890) 2

In re Storti, 178 Mass. 549, 60 N.E. 210 (1901) 7

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947) 6

Malloy v. South Carolina, 237 U.S. 180 (1914) 2

McCleskey v. Kemp, 481 U.S. 279 (1987) 6

Provenzano v. State, 1999 WL 756012 (Fla. 1999) 2

Stanford v. Kentucky, 492 U.S. 361 (1989) 10

Thompson v. Oklahoma, 487 U.S. 815 (1988) 10

Trop v. Dulles, 356 U.S. 86 (1958) 3

Weems v. United States, 217 U.S. 349 (1910) 4

Wilkerson v. Utah, 99 U.S. 130 (1878) 3

Miscellaneous

Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 Wm. & Mary L. Rev. 551 (1994) ..... *passim*

Deborah W. Denno, *Getting to Death: Are Executions Constitutional ?* 82 Iowa L. Rev. 319 (1997) *passim*

Martin R. Gardner, *Executions and Indignities -- An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 Ohio St. L.J. 96 (1978) 3

Lonny J. Hoffman, Note, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 Tex. L. Rev. 1039 (1992) 11

Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections On Two Decades Of Constitutional Regulation Of Capital Punishment*, 109 Harv. L. Rev. 355 (1995) 11

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 80 state and local affiliate organizations numbering 28,000 members in fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as *amicus curiae* on numerous occasions. *See, e.g., Jones v. United States*, 119 S.Ct. 1215 (1999).[1]

STATEMENT OF THE CASE

One hundred years ago – on the eve of the twentieth century – this Court sanctioned the State of New York's experiment through the use of modern science to find "the most humane and practical method ... of carrying into effect the sentence of death." Deborah W. Denno, *Is Electrocution*

---

[1] Both parties have consented to the appearance of NACDL as *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup.Ct. Rule 37.6.

an Unconstitutional Method of Execution? The Engineering of Death over the Century, 35 Wm. & Mary L. Rev. 551, 566-67 (1994)("Denno I"). New York's Governor noted in this regard:

> The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide the means for taking the life of such as are condemned to die in a less barbarous manner.

In re Kemmler, 136 U.S. 436, 444 (1890)(quoting the annual message of the Governor of New York, dated January 6, 1885).

Thus was electrocution adopted as the principal execution alternative to hanging in this century. Denno I, at 562-607. By 1913, the year preceding the outbreak of World War I, a total of fifteen states had changed to electrocution as a result of "a well-grounded belief that electrocution is less painful and more humane than hanging." *Malloy v. South Carolina*, 237 U.S. 180, 185 (1914). By 1949, electrocution reached its high-water mark, having been adopted by twenty six states. *See* Deborah W. Denno, *Getting to Death: Are Executions Constitutional?* 82 Iowa L. Rev. 319, 365 n.276, 404-08 (Tables 3-7) (1997)("Denno II").[2]

From the outset, however – beginning literally with the botched execution of William Kemmler himself --

---

[2] No state has adopted electrocution since 1949, and, beginning in 1951, it has been steadily abandoned in favor of, *inter alia*, lethal injection in all but four jurisdictions: Florida, Georgia, Alabama and Nebraska. *See* Denno II, 82 Iowa L. Rev. at 363-70 & nn.270-98 (collecting statistics on changes of execution methods by states). *See also Provenzano v. State*, 1997 WL 756012 (Fla. September 24, 1999), at *6 (Harding, C.J., specially concurring) and *24 & n.38 (Shaw, J., dissenting).

electrocution has been fraught with extraordinary uncertainties (not to mention regular and repeated malfunctions) in the course of its administration. Denno II, 82 Iowa L. Rev. at 336. *See also Provenzano*, at *5 (Harding, C.J. specially concurring)("each time an execution is carried out, the courts wait in dread anticipation of some 'unforeseeable accident'").

Notwithstanding the *Kemmler* Court's naïve confidence that "it is within easy reach of electrical science at this day to so generate and apply to the person of the convict a current of electricity of such known and sufficient force as certainly to produce instantaneous, and, therefore, painless death" (136 U.S. at 443), the history of electrocution in this century has amounted to an unimaginable spectacle more reminiscent of a "gruesome ritual" involving "a barbaric torture device". Martin R. Gardner, *Executions and Indignities – An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 Ohio State L.J. 96, 126-27 n.228 (1978). *See also* the graphic catalogue of post-*Gregg* botched electrocutions since 1979 in Denno II, 82 Iowa L. Rev. at 412-24; *Glass v. Louisiana*, 471 U.S. 1080, 1086-92 (1985)(Brennan, J., joined by Marshall, J., dissenting from denial of certiorari).

As we stand on the eve of the twenty-first century, then, the time is long overdue that we reconsider the electric chair in light of contemporary scientific knowledge, presently available medical alternatives (e.g., lethal injection), and the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(plurality opinion). So considered – one hundred years after *Kemmler* – the electric chair should be retired as a one-time technological advance whose time has come and long-since gone. *Compare Kemmler*, 136 U.S. at 446 (burning at the stake, crucifixion, breaking on the wheel); *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878)(disemboweling, beheading, quartering, public

dissection); *Weems v. United States*, 217 U.S. 349, 377 (1910)(quartering, hanging in chains, castration). *See also* Denno I, 35 Wm. & Mary L. Rev. at 567 n.87 (enumerating thirty four methods of execution known at the time of *Kemmler*).

SUMMARY OF ARGUMENT

The Eighth Amendment protects us from more than mere physical torture and barbaric punishment. It protects not only against the unnecessary and wanton infliction of pain but also against any punishment that is incompatible with our evolving standards of decency that mark the progress of a maturing society. It also protects the dignity of the individual – even the condemned in his final moments. Cruelty does not necessarily involve pain and may be reflected in needless degradation, even extending to treatment of the remains of the condemned during and after death.

Evaluated under these standards, the use of electrocution as a means of capital punishment no longer comports with the standards of decency that animate the Eighth Amendment. While imposition of a death sentence is supposed to be as instantaneous and painless as possible, contemporary scientific evidence indicates that it inflicts unnecessary pain and suffering on the victim, far more than necessary for the "mere extinguishment of life." In addition, the mutilation, burning and other physical indignities that routinely accompany electrocution unnecessarily violate the human dignity of the condemned. Finally, evolving standards of decency, as reflected in legislative trends, national consensus and the ready availability of a more humane medical alternative – lethal injection – which has already been adopted by the majority of states, compel the conclusion that the electric chair is no longer an acceptable method of capital punishment, scientifically or constitutionally.

ARGUMENT

EXECUTION BY ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT INSOFAR AS IT CONSTITUTES THE UNNECESSARY AND WANTON INFLICTION OF PAIN, VIOLATES HUMAN DIGNITY AND IS CONTRARY TO EVOLVING STANDARDS OF DECENCY IN LIGHT OF HUMANE MEDICAL ALTERNATIVES AND CONTEMPORARY PUBLIC CONSENSUS

As early as 1910, this Court recognized that the Cruel and Unusual Punishment Clause's prohibitions are not limited to those methods of punishment that were considered cruel or unusual at the time the Bill of Rights was adopted. *Weems*, 217 U.S. at 372-73. The Framers understood that our society's mores would evolve, and that some methods that had been widely employed would become unacceptable to society, just as the torturous and barbaric punishments of the Stuarts had become unacceptable by the Framers' own time. *Id.* at 372. They therefore framed a prohibition on cruel and unusual punishment which is dynamic and "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378.

As this Court made clear in *Trop*, a punishment that is incompatible with our evolving standards of decency violates the cruel and unusual punishment clause. 356 U.S. at 101-02. In addition, a punishment violates the clause if it involves "the unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)(opinion of Stewart, Powell & Stevens, JJ.). The Eighth Amendment thus embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency ..." against which we evaluate penal measures. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)(quoting *Jackson v. Bishop*, 404 F.2d

571, 579 (8th Cir. 1968)(Blackmun, J.)); *McCleskey v. Kemp*, 481 U.S. 279, 301 (1987)("any punishment might be unconstitutionally severe if inflicted without penological justification"). Thus, "[P]unishments 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or 'involv[ing] the unnecessary and wanton infliction of pain' are 'repugnant to the Eighth Amendment'". *Hudson v. McMillan*, 503 U.S. 1, 10 (1992).

This Court has emphasized that the Eighth Amendment forbids "inhuman and barbarous" methods of execution that go at all beyond "the mere extinguishment of life" and cause "torture or a lingering death". *Kemmler*, 136 U.S. at 447. It is beyond all debate that the Amendment proscribes all forms of "unnecessary cruelty" that cause gratuitous "terror, pain, or disgrace." *Wilkerson v. Utah*, 99 U.S. at 135-36. *See also Furman v. Georgia*, 408 U.S. 238, 430 (1972)(Powell, J., dissenting)("[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives").

Indeed, the Constitution requires that the state allow the condemned to die with as much dignity as possible. *Gregg*, 428 U.S. at 182 (opinion of Stewart, Powell & Stevens, JJ.). The Eighth Amendment's protection of "the dignity of man", *Trop v. Dulles*, 356 U.S. at 100, extends beyond prohibiting the unnecessary infliction of pain. It requires a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. Basic notions of human dignity require that the state minimize "mutilation" and "distortion" of the condemned prisoner's body, even after death. These principles explain the Eighth Amendment's prohibition of such barbaric practices as drawing and quartering not only before but also after the death sentence has been fully carried out. *Wilkerson*, 99 U.S. at 135. *See also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 473-74 (1947)(Burton,

J., joined by Douglas, Murphy & Rutledge, JJ., dissenting)("Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people. *** The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself"); *In re Storti*, 178 Mass. 549, 60 N.E. 210, 210 (1901)(Holmes, C.J.)(the change from hanging to electrocution "was devised for reaching the end proposed as swiftly and painlessly as possible").

Evaluated under these standards, electrocution clearly violates contemporary civilized norms. First, it constitutes the "unnecessary and wanton infliction of pain," entailing far more pain and suffering than the "mere extinguishment of life," as that standard has been enunciated in *Kemmler* and *Resweber*. Second, the mutilation, burning and grotesque physical indignities that routinely accompany the customary electrocution unnecessarily violate the human dignity of the condemned. *See Weems* and *Trop v. Dulles*. Finally, evolving standards of decency, as reflected by legislative trends, national consensus and the ready availability of more humane medical alternatives – alternatives that have already been adopted in the overwhelming majority of states -- all compel the conclusion that electrocution is no longer constitutionally acceptable.

A. The Unnecessary and Wanton Infliction of Pain

Notwithstanding largely outdated claims that electrocution is painless, a substantial body of systematic research has accumulated over the last several decades which, when considered in tandem with recent expert observations and eyewitness accounts, belie any suggestion that electrocution is either invariably instantaneous or painless. Research on the effects of electricity on the brain indicate that during an

intentional electrocution, an individual is very likely to: (1) experience intense pain, (2) die slowly, (3) evidence serious emotional trauma, and (4) remain conscious. Denno II, 82 Iowa L. Rev. at 356-58 & nn.220-240 (and authorities collected therein). Moreover, a wide range of factors associated with electrocution, such as severe (third and fourth degree) burning, boiling bodily fluids (>160 degrees), asphyxiation and cardiac arrest can cause extreme pain when unconsciousness is not instantaneous. *Id.* *See also* Denno I, 35 Wm. & Mary L. Rev. at 637-45 (collecting authorities).

Moreover, the sheer number of documented instances of botched electrocutions, both in the immediate aftermath of *Kemmler* (1890) and, more recently, in the wake of *Gregg* (1976), conclusively demonstrate that the risk of inflicting "unnecessary and wanton pain" as a result of malfunction is substantial. Denno I, 35 Wm. & Mary L. Rev. at 646-54, 662-74; Denno II, 82 Iowa L. Rev. at 360-63, 412-24 (cataloguing at least eighteen botched post-*Gregg* electrocutions, complete with smoke, flames, burning flesh, pungent smells and repeated electrical jolts after initial current failed to kill the condemned).

When Justice Frankfurter cast his deciding vote in *Resweber* (329 U.S. at 471), he specifically disavowed any suggestion that he would countenance "a hypothetical situation, which assumes a series of abortive attempts at electrocution ..." With fifty additional years of history at our disposal, it may safely be said that the likelihood of repeatedly-botched electrocutions is no longer merely hypothetical; rather, it has become a gruesome and ghastly reality.

B. The Offense to Human Dignity

The Eighth Amendment prohibits not only unnecessary pain and suffering in connection with executions. It also prohibits grotesque physical indignities,

pre- or post-mortem, such as mutilation, dismemberment, beheading and dissection. Thus, even were death by electrocution instantaneous, it would still be unconstitutional given the unnecessary violence it inflicts upon the human body. The evidence of post-mortem autopsies, eyewitness accounts, and examinations by experts all confirm without exception that burns and mutilation of the body of the condemned is a regular incident of electrocution.

Mutilation results from excessive burning of the skin that removes chunks of flesh from the prisoner's head and body and reveal leg and skull bone wherever the skin was in contact with an electrode. Charring of the skin is commonplace as are vomiting and drooling, blood flowing from facial orifices, intense muscle spasms and contractions, odors resulting from burning flesh and extensive sweating and swelling of skin tissue as the body temperature heats to in excess of 160 degrees. Were this not enough, the condemned is often compelled to wear a diaper to deal with the involuntary defecation and micturition that is the inevitable by-product of a violent electrocution. Thus is the condemned – fully aware of the cruel indignities that await him in the chair – also condemned to experience elevated levels of anxieties and fear as his execution nears. Denno II, 82 Iowa L. Rev. at 359-60; Denno I, 35 Wm. & Mary L. Rev. at 643-45.

Mutilation of the body, unfortunately, is unavoidable insofar as it is inherent in the very nature of electrocution. That does not, however, exempt it from violating the very proscription that the Eighth Amendment was enacted to prevent – stripping the condemned of his last shred of dignity even while the state takes his very life.

C. Standards of Decency and Legislative Trends

In determining whether a punishment is incompatible with our evolving standards of decency, we look first and primarily to "objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S. at 173 (opinion of Stewart, Powell & Stevens, JJ.). The most important objective evidence consists of the statutes adopted by society's elected representatives. *Stanford v. Kentucky*, 492 U.S. 361, 367-70 (1989). Where state legislatures have reached a sufficient "degree of national consensus" in rejecting a particular punishment, *id.* at 370-71, that punishment is unconstitutional. Although this Court has never made explicit how much of a consensus is sufficient, it is clear that at some point the state legislative trend will become so compelling that it cannot be ignored. *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977); *see also Thompson v. Oklahoma*, 487 U.S. 815, 828-29 (1988).

With respect to electrocution, the legislative trend to reject it in favor of lethal injection has amounted to a veritable stampede. No state has adopted electrocution as a method of execution since 1949, when twenty six states employed it. Commencing in 1951, when the trend away from electrocution began, twenty two of those self-same states have switched to lethal injection as the principle mode of execution. *See* Denno II, 82 Iowa L. Rev. at 363-70 & nn.270-298; *see also id.* at 439-64 (Appendix 3)(state by state trends in execution methods). Indeed, in the case of several of the most recent lethal-injection converts – Virginia and Louisiana – problems with repeatedly botched electrocutions and the fear of constitutional litigation with respect to their electric chairs appeared to be the principal motivating factors in their respective legislature's sudden changes of heart vis-à-vis execution methods. *See* Denno I, 35 Wm & Mary L. Rev. at 674-76; Denno II, 82 Iowa L. Rev. at 448 n.823 (Louisiana) and 462-63 n.921 (Virginia).

Thus, at present there are only four states which retain electrocution as their sole methods of execution, three of them representatives of the Old Confederacy – Florida, Georgia and Alabama – and Nebraska. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections On Two Decades Of Constitutional Regulation Of Capital Punishment*, 109 Harv. L. Rev. 355, 405-07 (1995). (It should also come as no surprise that those same three states are also prominently represented on the Honor Roll of repeatedly-botched executions (along with Louisiana and Virginia) during the post-*Gregg* era).

Of course, the standard rejoinder to episodes of botched electrocutions is to attribute them to "unavoidable accidents." There comes a point in time, however, when the sheer multiplicity and frequency of "accidents" becomes so "longstanding, pervasive, well-documented, or expressly noted by prison officials" as to raise a flurry of warning flags under the Eighth Amendment:

> These incidents can, of course, be characterized as isolated. No doubt they are, if what is meant by isolated is that no multistate conspiracy to botch electrocutions exists. But taken together, the innumerable episodes of mechanical failure and human error evidence the reality that the problems with electrocution are inherent in the method and are not limited to the particular equipment or the personnel employed. That the equipment is old or personnel incompetent may be another ground for challenging the administration of the method, but it is not the only ground.

Lonny J. Hoffman, Note, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 Tex. L. Rev. 1039, 1058 (1992).

Whatever else may be said of us as we close what some historians have characterized as "The American Century," let it also be said that the standards of decency by which we look upon ourselves as a civilized society have sufficiently evolved that we are prepared to relegate medieval torture devices like the electric chair to the dustbin of history.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted,

EDWARD M. CHIKOFSKY
Counsel of Record
301 East 87th Street
New York NY 10128
(212) 289-1062

BARBARA E. BERGMAN
UNM School of Law
1117 Stanford, N.E.
Albuquerque NM 87131
(505) 277-3304

December 1999

(11)

(9)

No. 99-6723

Supreme Court, U. S.
FILED
DEC 20 1999
OFFICE OF THE CLERK

DEC 20 1999 IN THE

Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

v.

MICHAEL W. MOORE, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AND THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (AMERICAN SECTION) ("IAJLJ") AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DENNIS RAPPS
NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA")
1290 Avenue of the Americas
New York, NY 10104
(212) 314-6384

ROBERT L. WEINBERG
INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS AMERICAN SECTION ("IAJLJ")
1640 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 775-0991

NATHAN LEWIN
Counsel of Record
ALYZA D. LEWIN
MILLER, CASSIDY, LARROCA & LEWIN, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Amici Curiae

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

ARGUMENT 3

Introduction 3

I. The Biblical Obligation To Be Sensitive to Fellow Human Beings Led the Rabbis To Prescribe the Least Painful and Least Disfiguring Means for Implementing the Four Forms of Execution 7

II. Modern Application of Jewish Law Implements the Same Principles of Humanity and Consideration 11

CONCLUSION 13

APPENDIX

TABLE OF AUTHORITIES

CASES **Page(s)**

State of Israel v. Tamir, 37(iii) P.D. 201
(Supreme Court of Israel, 1983) 6, 11

BIBLICAL SOURCES

Exodus 17:4 3
Exodus 8:22 3
Leviticus 19:18 8
Leviticus 20:14 3
Leviticus 21:9 3
Numbers 14:10 3

TALMUDIC SOURCES

Talmud Bavli: *Ketubot* 37a 10
Talmud Bavli: *Makkoth* 7a 4
Talmud Bavli: *Pesachim* 75a 10
Talmud Bavli: *Sanhedrin* ..... *passim*

OTHER AUTHORITIES

Menachem Elon, *Ha-Mishpat Ha-Ivri*
(Magnes Press, The Hebrew University,
Jerusalem, 1973) 6

Menachem Elon, *Jewish Law: History, Sources, Principles*, (Bernard Auerbach and Melvin J. Sykes trans., Jewish Publication Society, Philadelphia, 1994) 6

Menachem Elon, *et al.*, *Jewish Law (Mishpat Ivri): Cases and Materials* (MB 1999) 12

Maimonides, *Mishneh Torah, Book of Judges, Sanhedrin* 5

I

INTEREST OF THE AMICI CURIAE[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed numerous *amicus curiae* briefs in this Court on issues of concern to the Orthodox Jewish community.

The International Association of Jewish Lawyers and Jurists ("IAJLJ") is an organization whose membership is drawn from more than 30 countries. The Association was formed in 1969 in Jerusalem at the First International Congress of Jewish Lawyers and Jurists. Former Justice of the United States Supreme Court and United Nations Ambassador Arthur J. Goldberg was elected president. The American Section of the IAJLJ represents the American Jewish legal community, defending Jewish interests and human rights in the United States and abroad.

COLPA and IAJLJ are vitally interested in promoting the study of, and respect for, principles of Jewish Law as they have been applied throughout the history of the Jewish people. COLPA and the national groups that it routinely represents promote and encourage in-depth study of Talmudic texts. IAJLJ has sponsored public lectures in Jewish Law and promoted the publication of scholarly essays in the field of Jewish Law.

COLPA and IAJLJ are submitting this *amicus curiae* brief to advise the Court how questions concerning the *mode*

---

[1] No party or party's counsel authored this brief in whole or in part, and no person or entity other than the *amici curiae*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief. See Rule 37.6.

of execution were resolved in the oldest and most venerable legal system known to man. The Jewish legal system – based on Biblical text, oral tradition, and rabbinic interpretation – considered and discussed the implementation of the death penalty. At first blush, the means prescribed by Jewish Law for the execution of an individual who is condemned to death by a duly authorized court seem cruel and insensitive to the pain and disfigurement that accompanies the death of the accused. But a close examination of the rabbinic interpretation of the Biblical text discloses that approximately 2000 years ago the rabbis of the Talmud agreed that execution must be carried out quickly and as painlessly as possible. They also agreed that an execution should not mutilate or disfigure the body of the condemned person. The relevant passages from the Talmud demonstrate that the rabbis sought -- with the scientific knowledge and means available to them in their time -- to formulate the quickest, least painful, and least disfiguring methods of execution that the technology of the day would allow within the framework of Biblical texts.

Guidelines consistent with those set forth by the rabbis of the Talmud appear to emerge, as well, from the language of this Court's recent decisions relating to capital punishment. This *amicus* brief therefore supports the proposition that, separate and apart from the issue of capital punishment itself, a particular method of administering capital punishment that fails the standards of rapid and painless death and that results in mutilation or disfigurement should today be unacceptable under the evolving standards of human decency mandated by the Eighth Amendment.

This *amicus* brief describes the methods of execution prescribed by Jewish Law. The details of these methods (which may appear unusual to modern society) are described *not* for comparison with means of execution under contemporary standards. Our point is that the principles

through which they were formulated can serve as a guide. It is clear that the rabbis sought to administer the most humane forms of capital punishment then available. These principles should be applied by this Court to evaluate whether execution by the electric chair, as administered in Florida, results in unnecessary pain and disfigurement. If electrocution, as currently administered, results in needless pain and mutilation, it would not meet the rationale of Jewish Law as administered 2000 years ago and should not be acceptable today under the evolving standards of the Eighth Amendment.

ARGUMENT

Introduction

Capital punishment is a penalty prescribed by Biblical law for the commission of offenses that violate ritual prohibitions (such as deliberate desecration of the Sabbath) as well as laws regarding interpersonal relationships (murder, kidnapping, incest). The Biblical text explicitly specifies two forms of execution: stoning (*Exodus* 17:4, 8:22; *Numbers* 14:10) and burning (*Leviticus* 20:14, 21:9). The oral tradition includes two additional means -- strangulation and decapitation.

Although the Biblical text appears to contemplate frequent imposition of capital punishment, the weight of authority among rabbis of the Mishnaic period (1st-3rd centuries of the Common Era), who first committed to writing what had theretofore been transmitted from generation to generation as the Oral Law, clearly condemned

frequent executions. The Mishna[2] in the tractate *Makkoth* (7a) declared:

> The Sanhedrin[3] that executes one person in seven years is called "murderous." Rabbi Elazar ben Azariah says that this extends to one execution in seventy years. Rabbi Tarfon and Rabbi Akiva say, "If we had been among the Sanhedrin, no one would ever have been executed." Rabbi Simon ben Gamliel responds, "Such an attitude would increase bloodshed in Israel."

This exchange among rabbis living in the first and second centuries reflects differences over the deterrent value of capital punishment that continue among legal scholars to this day. Some rabbis of the Mishnaic period (such as Rabbis Tarfon and Akiva) were unwilling to participate in a process that would take human life, while other rabbis (like Rabbi Simon ben Gamliel) believed that capital punishment had a deterrent effect that permitted it to be employed.

The infrequency of the death penalty was attributable to the meticulous application of stringent rules regarding the admissibility and sufficiency of evidence. A court of at least

---

[2] The Mishna is "the collection of mostly halachic Jewish traditions compiled about A.D. 200 and made the basic part of the Talmud." *Merriam Websters' Collegiate Dictionary* (10th ed. 1993). The Talmud, which was compiled in the Fifth Century, is the authoritative body of Jewish tradition and is comprised of the "Mishna" and the "Gemara."

[3] The Sanhedrin was the "supreme legislative council and highest ecclesiastical and secular tribunal of the Jews, consisting of 71 members and exercising its greatest authority from the Fifth Century B.C. to A.D. 70." *Webster's Encyclopedic Unabridged Dictionary of the English Language* (1989).

23 judges would have to be satisfied, to a legal certainty, that the capital offense had been committed before the court could impose a death sentence. Since the testimony of two eye-witnesses was required, and the witnesses were subjected to searching and detailed interrogation by the court, there was rarely an instance when the evidence met the prescribed legal standard. *See* Maimonides, *Mishneh Torah, Book of Judges, Sanhedrin*, chapter XII.[4]

By Talmudic prescription and the rulings of Jewish-law codifiers through Maimonides, the particular form of execution to be administered under Jewish law depended upon the nature of the offense. Each of these forms, however, had to be administered in the most humane manner possible.

This *amicus* brief does not address the question of whether all capital punishment should today be rejected as "cruel and unusual" punishment. That question is not before the Court in this case. Our brief addresses only the question whether the mode of execution employed by Florida renders capital punishment "cruel and unusual" in that State. This brief accordingly reviews rabbinic doctrines and discussion regarding the *methods* used in implementing the death penalty.

It is striking, we submit, that in prescribing methods for imposition of the death penalty almost two millennia ago,

---

[4] Rabbi Moses ben Maimon (also known as Maimonides) was a rabbinic authority and leading early codifier of Jewish Law. Born in Spain in 1135, he settled first in Morocco and then in Egypt, and died in 1204. His 14-volume work, called *Mishneh Torah*, is viewed as the earliest enduring codification of Jewish Law. Maimonides also served as a royal physician and a philosopher. He is also the author of a leading Jewish philosophical work called *Moreh Nevuchim* ("The Guide to the Perplexed").

the rabbis of the Talmud were concerned about the same factors that have emerged from this Court's Eighth Amendment jurisprudence. Primary concerns under Talmudic law are (1) the prevention of unnecessary pain and (2) avoidance of mutilation or dismemberment of the body. As discussed below, the four means of execution described in the Talmud were designed to utilize the most effective technology and scientific knowledge available at the time, to minimize the pain of the person who was being put to death, and to avoid mutilation of his or her body. The methods described in the Talmud, therefore, differ significantly from what is commonly assumed from a reading of the Biblical text.

The conclusions regarding Jewish Law that we summarize in this brief were expressed in an opinion issued by the then Deputy President of the Supreme Court of Israel, the Honorable Menachem Elon, in *State of Israel v. Tamir*, 37(iii) P.D. 201 (1983). Justice Elon, who is now retired from the Israeli Supreme Court, has reviewed the text of this *amicus* brief and authorized us to state that he concurs with its conclusions.[5]

---

[5] Counsel note that Justice Elon is the world's foremost modern legal authority on "Mishpat Ivri" – legal principles derived from traditional Jewish Law. His comprehensive treatise, *Ha-Mishpat Ha-Ivri*, was published in Israel in 1973, before he was appointed a Justice of the Supreme Court of Israel, and republished in 1978 and 1988. Elon, *Ha-Mishpat Ha-Ivri* (Magnes Press, The Hebrew University, Jerusalem, 1973). It was translated into English and published in four volumes in 1994 by the Jewish Publication Society. Menachem Elon, *Jewish Law: History, Sources, Principles*, (Bernard Auerbach and Melvin J. Sykes trans., Jewish Publication Society, Philadelphia, 1994)

I

THE BIBLICAL OBLIGATION TO BE SENSITIVE TO FELLOW HUMAN BEINGS LED THE RABBIS TO PRESCRIBE THE LEAST PAINFUL AND LEAST DISFIGURING MEANS FOR IMPLEMENTING THE FOUR FORMS OF EXECUTION

A casual reader of the Biblical text might assume that the execution described as "stoning" is carried out by hurling stones at the condemned individual until he dies from the force of the objects thrown at him and that "burning" is accomplished by subjecting the condemned to a burning flame after tying the condemned to a stake or casting him or her on a funeral pyre. The oral tradition, however, as explicated by the rabbis of the Talmud demonstrates that neither of these descriptions is the "stoning" and "burning" envisioned by the Bible.

A. "Stoning" Was Intended To Be a Quick and Relatively Painless Form of Non-disfiguring Execution.

The Mishna in tractate *Sanhedrin* (45a) describes execution by "stoning." The condemned defendant was pushed from a platform set high enough above a stone floor that his fall would probably result in instantaneous death.[6]

The Talmud explains that the height from which the accused was pushed was substantial enough that death was

---

[6] We reproduce, as Amicus App. A, pp. 1a -- 30a, *infra*, copies of the relevant pages of *Talmud Bavli*: *Sanhedrin* (Mesorah Publications, Inc., 1994) with the permission of the publisher.

virtually certain. Providing for an immediate death was, according to the Talmud, derived from the Biblical commandment (*Leviticus* 19:18), "You shall love your fellow as yourself." This commandment requires a court to select for a condemned man a humane (*i.e.*, painless) death (*Sanhedrin* 45a). Rashi, the leading medieval commentator on the Talmud,[7] explained that when the Talmud says a "humane death" it means a "quick death."

The continuation of the discourse in *Sanhedrin* reveals that the rabbis' ultimate concern was that the mode of execution be as quick and as painless as possible, *and* that it cause as little disfigurement as possible. When one rabbi suggested that the height of the platform should be increased so that death from the fall would be certain, another rabbi responded that raising the platform is unacceptable because a fall from too high a platform would result in disfigurement.

B. "Burning" Was Intended To Be a Quick and Relatively Painless Non-disfiguring Form of Execution.

The Mishna in *Sanhedrin* (52a) also described the procedure for "burning" and stated clearly that it did not involve actual resort to fire or flames. Rather, an extremely hot object (or wick) was inserted into the mouth of the condemned individual so as to cause instantaneous death. Here, too, the objective was to cause death quickly and without mutilation of the body.

---

[7] Rabbi Shlomo ben Yitzchak (also known as Rashi) was born in 1040 in Troyes, France, and died in 1105. He is the foremost Jewish commentator on the Bible and Talmud. His commentary, which combines literal and allegorical explanations, appears in all standard volumes of the Bible and Talmud.

Indeed, the Mishna concludes with a very revealing passage that condemns any court that would put an accused to death with actual flames (*id.*; emphasis added):

> Rabbi Elazar the son of Rabbi Tzadok said "An incident once occurred with the daughter of a priest who committed adultery and they surrounded her with bundles of branches and burned her." The other rabbis responded to him, "That was done because the court that performed this execution was not knowledgeable."

The concluding comment of the Mishna indicates that regardless of the common understanding of "burning," the rabbis believed that a court that would actually set a person on fire was a court acting in error. The Talmud, in fact, explains that the incident reported in the Mishna was the work of a court of Sadducees (*i.e.*, those who mistakenly applied the Biblical text without taking account of the oral tradition and rabbinic interpretation). This passage demonstrates once again the rabbis' primary concern that the method of execution not cause unnecessary pain or disfigurement of the body.

C. Decapitation and Strangulation Were Intended To Be Quick and Relatively Painless Forms of Execution.

The Mishna (*Sanhedrin* 52b) describes execution by decapitation – which was invoked primarily for murderers – as the same form of capital punishment that was used at the time by civil rulers under the Roman legal system. The condemned person's trachea and esophagus were severed with a sharp sword so that he would die instantly. When one rabbi of the Mishna suggested that it was too demeaning to the accused to be executed in a standing position because his

body would slump to the floor and that, instead, his head should be positioned on a wooden chopping-block and removed with an ax, the majority of the rabbis responded that this was impermissible because it could result in even greater mutilation.

This discussion on the subject of decapitation reveals again how conscious the rabbis were of the obligations (1) to impose rapid death, (2) to minimize pain, and (3) to avoid mutilation. In actual administration of this form of execution, they sought to achieve these objectives. The discussion of this form of execution was again concluded with the previously cited observation, attributed to one Rabbi Nachman, quoting Rabba the son of Avuha: "Scripture states, 'You shall love your fellow as yourself' so that you must choose for him a humane death." This admonition is repeated in the Talmudic tractates *Pesachim* (75a) and *Ketubot* (37a).

The same principle governed the rules of strangulation. Death is caused by quick and certain choking when a cord around the condemned person's neck is pulled in opposite directions simultaneously by the eye-witnesses to the offense (who are required to participate in the execution). Pain and mutilation are minimized because the cord that is used for the execution is placed within a soft cloth. The Talmud explains that this form of death "leaves no mark on the body."

II

MODERN APPLICATION OF JEWISH LAW IMPLEMENTS THE SAME PRINCIPLES OF HUMANITY AND CONSIDERATION

The State of Israel has abolished capital punishment for all offenses other than genocide, war crimes, crimes against humanity, crimes against the Jewish people, and treason in wartime. The only execution that has taken place in Israel was the execution of Adolf Eichmann, in which the condemned man was hanged.

In an important prisoners'-rights case, however, Deputy President of the Supreme Court Menachem Elon wrote an opinion in which he said (*State of Israel v. Tamir*, 37(iii) P.D. 201 (1983)):

> Jewish Law was particularly insistent on the preservation of even a criminal's rights and dignity during the course of punishment. Maimonides, after dealing with the types of punishment a court may impose, including imprisonment, concludes: "All these matters apply to the extent that the judge deems appropriate and necessary for the needs of the time. In all matters, he shall act for the sake of Heaven and not regard human dignity lightly .... He must be careful not to destroy their dignity." According to Jewish law, a death sentence must be carried out with the minimum of suffering and without offense to human dignity. This is based on the Biblical verse,

> "Love your fellow as yourself," and the rule is, "Choose for him a humane death." From this we declare that even a condemned felon is your "fellow."[8]

Contemporary Jewish Law coincides with the Jewish Law doctrines that governed two millennia ago. It is not permissible to execute a condemned man or woman by means that cause unnecessary pain, delay or disfigurement. Even in the rare case when the State has determined that the accused must be put to death because he or she committed a heinous offense, the condemned is legally entitled to consideration and dignity.

---

[8] Justice Elon's opinion in the *Tamir* case, translated into English, is reprinted in full in Elon, *et al.*, *Jewish Law (Mishpat Ivri): Cases and Materials* (Matthew Bender & Co, Inc., New York, 1999) pp. 567-572.

CONCLUSION

If execution by the electric chair, as administered in Florida, results in unnecessary pain and disfigurement, it would be unacceptable under the principles underlying the traditional Jewish legal system applied 2000 years ago, and should also be unacceptable under the Eighth Amendment today.

Respectfully submitted,

DENNIS RAPPS
NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS
("COLPA")
1290 Avenue of the Americas
New York, NY 10104
(212) 314-6384

ROBERT L. WEINBERG
INTERNATIONAL ASSOCIATION OF
JEWISH LAWYERS AND JURISTS
AMERICAN SECTION ("IAJLJ")
1640 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 775-0991

NATHAN LEWIN
(Counsel of Record)
ALYZA D. LEWIN
Miller, Cassidy, Larroca &
Lewin, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037-1302
(202) 293-6400

Attorneys for the Amici Curiae

December 1999

Mishnah The Mishnah now describes the procedure for execution by stoning:

בֵּית הַסְּקִילָה הָיָה גוּבָהּ שְׁתֵּי קוֹמוֹת – **The elevation of the stoning grounds was twice the height** of a man.[22] The condemned man is made to stand sideways at the edge of this elevation, and there, אֶחָד מִן הָעֵדִים דּוֹחֲפוֹ עַל מָתְנָיו – **one of the witnesses pushes him by his hips** so that he will fall to the ground on his side. נָהְפַּךְ עַל לִבּוֹ – **If he falls onto his chest,** הוֹפְכוֹ עַל מָתְנָיו – **he is turned onto his hips.**[23] וְאִם מֵת מֵהָה יָצָא – **If he had died from this** fall, **it is sufficient** [i.e. the court has fulfilled its obligation];[24] וְאִם לָאו הַשֵּׁנִי נוֹטֵל אֶת הָאֶבֶן וְנוֹתְנוֹ עַל לִבּוֹ – **if not, the second** witness **picks up the stone and casts it upon his chest.** אִם מֵת מֵהָה יָצָא – **If he dies from this, it is sufficient;** וְאִם לָאו רַגּוּמָתוֹ כָּל יִשְׂרָאֵל – **if not, his stoning is** carried out **by all of Israel,**[25] שֶׁנֶּאֱמַר – **as it states:**[26] ,,יַד הָעֵדִים תִּהְיֶה־בּוֹ בָרִאשֹׁנָה לַהֲמִיתוֹ וְיַד כָּל־הָעָם בָּאַחֲרֹנָה'' – ***The hand of the witnesses shall be upon him first to put him to death, and the hand of the entire nation afterwards.***

1a

Gemara The Mishnah stated that the condemned man stood on a precipice that was twice the height of a man. A Baraisa elaborates upon this:

תָּנָא – **It was taught in a Baraisa:** וְקוֹמָה שֶׁלּוֹ – **AND** there was **HIS** own **HEIGHT** too; הֲרֵי בָּאן שָׁלֹשׁ – thus, **WE HAVE HERE** an elevation that is **THREE** times the height of a man.[27]

The Gemara asks:

וּמִי בָּעִינַן כּוּלֵּי הַאי – **And do we** really **need that much** height to cause the condemned to die? וּרְמִינְהוּ – **But contrast this with the teaching of [the following Mishnah]:**[28] מַה בּוֹר שָׁהוּא כְדֵי לְהָמִית עֲשָׂרָה טְפָחִים – The Torah specified the word "pit" to teach that **JUST AS** the average **PIT IS DEEP ENOUGH TO CAUSE DEATH,** being at least **TEN HANDBREADTHS** deep; אַף כֹּל כְּדֵי לְהָמִית עֲשָׂרָה טְפָחִים – **SO** too, **EVERY** other type of excavation must be **DEEP ENOUGH TO BRING ABOUT DEATH** – that is, **TEN HANDBREADTHS** – in order for the person who dug it to be liable for accidental deaths.[29] Evidently, then, a fall from the mere height of ten handbreaths is sufficient to cause death. Why, then, does our Mishnah require the condemned to be pushed from the considerably greater height of nine *amos*?[30]

The Gemara answers:

אָמַר רַב נַחְמָן אָמַר רַבָּה בַּר אֲבוּהּ – **It is because Rav Nachman said in the name of Rabbah bar Avuha:** אָמַר קְרָא – **The verse states:**[31] ,,וְאָהַבְתָּ לְרֵעֲךָ כָּמוֹךָ'' – ***You shall love your fellow as yourself,*** which implies: בְּרוֹר לוֹ מִיתָה יָפָה – If your fellow has been condemned to die, **you shall choose for him a favorable death.** Thus, since a fall from a higher elevation will kill the condemned more quickly and with less pain, the Mishnah ordained that the precipice be higher than the minimum necessary to cause death.

The Gemara asks:

אִי הָכִי לִיגְבַּהֵיהּ טְפֵי – **If so, let us raise [the elevation of the stoning grounds]** even **more!** – ? –

The Gemara answers:

מִשּׁוּם דְּמִינְוָול – We do not do this, **for it would cause [the body]** of the condemned to **become grotesque.**[32]

The Mishnah stated:

אֶחָד מִן הָעֵדִים דּוֹחֲפוֹ – ONE OF THE WITNESSES PUSHES HIM...

The Mishnah teaches that the condemned is first pushed off a precipice, and if he survives the impact of the fall, he is then stoned. The Gemara now presents the Scriptural source for this sequence:

תָּנוּ רַבָּנָן – **The Rabbis taught in a Baraisa:** מִנַּיִן שֶׁבִּדְחִיָּיה – FROM WHERE is it known that those who touched Mount Sinai on the day of the revelation at Sinai were to be executed BY PUSHING?[33] תַּלְמוּד לוֹמַר ,,יָרֹה״ – For THE TORAH STATES: *HE SHALL BE HURLED DOWN.*[34] וּמִנַּיִן שֶׁבִּסְקִילָה – AND FROM WHERE is it derived that he is to be executed BY STONING?[35] תַּלְמוּד לוֹמַר ,,סָקֹל[ו]״ – For THE TORAH STATES: *HE SHALL BE STONED.*[36] וּמִנַּיִן שֶׁבִּסְקִילָה וּבִדְחִיָּיה – AND FROM WHERE is it derived that when one method alone fails to kill the offender, he should be executed BY both STONING AND PUSHING? תַּלְמוּד לוֹמַר ,,סָקוֹל יִסָּקֵל אוֹ־יָרֹה יֵרָה״ – For THE TORAH STATES: *HE SHALL SURELY BE STONED OR HE SHALL SURELY BE HURLED DOWN.*[37] וּמִנַּיִן שֶׁאִם מֵת בִּדְחִיָּיה יָצָא – AND FROM WHERE is it derived THAT IF HE DIES FROM the PUSHING alone, [THE COURT] HAS FULFILLED its obligation? תַּלְמוּד לוֹמַר ,,אוֹ־יָרֹה יֵרָה״ – For THE TORAH STATES: *OR HE SHALL SURELY BE HURLED DOWN.*[38] מִנַּיִן שֶׁאַף לְדוֹרוֹת כֵּן – And FROM WHERE is it derived THAT these rules apply EVEN TO future GENERATIONS, TOO?[39]

NOTES

22. [The average man has a height of three *amos* (*Rashbam* to *Bava Basra* 100b ד״ה והכוכין; cf. *Tosafos* ad loc. ד״ה והכוכין). Thus, twice the height of a man is six *amos*.]

23. If he falls to the ground with his face downward, he must be turned over on his side so that the stones can be thrown onto his chest, as described below. He cannot be turned over onto his back, because it would be too great of an indignity for him to lie facing up. Therefore, he is positioned on his side so that stones can be thrown onto his chest but he does not face upwards (*Rashi*, as interpreted by *Aruch LaNer*).

Others interpret *Rashi* to mean that he is originally pushed in a way that causes him to fall face down, because it would be an indignity for him to fall facing up. After he has fallen, he is turned face up, since if he has already expired it is no longer an indignity [indeed, this is the position in which a corpse is buried]; if he is still alive, this indignity is necessary to hasten his death (*Shevus Yaakov* 1:5 cited by *R' Akiva Eiger*; cf. *Rambam, Hil. Sanhedrin* 15:1; *Kessef Mishneh* ad loc.; see also *Yad Ramah*).

24. I.e. although the condemned person has not actually been pelted with stones, the mitzvah of execution by stoning has nevertheless been fulfilled. The Gemara will explain why this is so.

25. I.e. everyone present at the execution throws rocks upon him.

26. *Deuteronomy* 17:7.

27. I.e. the condemned was pushed from a standing – not a sitting – position. Thus, the total distance he fell was equal to the height of three men (*Rashi*).

28. *Bava Kamma* 50b.

[The Torah states that if one digs a בור, *pit*, in public property, and an animal subsequently falls into it and dies, he is liable for the death (*Exodus* 21:33). Now, *a pit* is defined as an excavation that is round and narrow (see *Bava Kamma* 50b). The Mishnah, however, generalizes and states that regardless of the shape of the excavation, the person who digs it will be responsible for damage it causes. The question then arises as to why the Torah mentioned a round pit specifically. The Mishnah now addresses this question.]

NOTES

29. *Rashi;* cf. *Tosafos.* [If an animal is found dead after falling into *any* type of excavation – be it a pit, trench, or ditch – the one who dug it is liable only if the hole was at least ten handbreadths deep (*Rashi*).]

30. *Tos. HaRosh* points out that the Gemara's question presumes that a height sufficient to kill an animal is sufficient to kill a man. See *there* for an explanation as to how this assumption is made.

31. *Leviticus* 19:18.

32. A height greater than the one prescribed by the Mishnah would result in the smashing of the fallen body. Thus, it would add markedly to the indignity of his execution (see *Rashi*).

33. I.e. by being pushed off a precipice. Before the Jewish nation received the Torah at Mount Sinai, God told Moses to warn the people not to touch the mountain. This warning was worded as follows (*Exodus* 19:13): לֹא־תִגַּע בּוֹ יָד כִּי סָקוֹל יִסָּקֵל אוֹ־יָרֹה יִיָּרֶה אִם־בְּהֵמָה אִם־אִישׁ לֹא יִחְיֶה *Let not any hand touch it; for [whoever does so] shall surely be stoned, or shall surely be hurled down; whether it is a beast or a man, it shall not live.*

Malbim states that the simple meaning of the verse is that the mountain itself shall miraculously repel anyone who touches it, hurling the offending man or animal to its death. The Sages, however, understood the verse as teaching that the offender is to be judged by the courts and executed at their hands, with the methods of execution being "hurling" [i.e. pushing the offender off a precipice] and "stoning." The Baraisa now delineates the various stages of this exposition.

34. *Exodus* 19:13.

35. I.e. from where is it known that the verse also prescribes death through pelting with stones? (*Rashi*).

NOTES

36. Scripture uses the word סָקוֹל to connote the throwing of stones at someone so as to execute him; see, for example, *Deuteronomy* 22:21: וְסָקְלוּהָ אַנְשֵׁי עִירָהּ בָּאֲבָנִים, *And the men of her city shall pelt her with stones* (*Rashi*).

37. Had only the words סָקוֹל and יָרָה been written, it might have been thought that the offender is to be subjected to either *hurling* or *stoning*, but not both. The verse thus states יְיַרֶּנָּה, a repetitive form of the word *hurl*, which conveys that both methods are to be employed when necessary (*Rashi*). [*Rashash* explains that the extra word יְיַרֶּנָּה is written to convey the following meaning: Although the court is indeed to pelt the offender with stones (סָקוֹל יִסְקְלֶנּוּ), it shall not do just this; rather, it must first push the person off a precipice (יְיַרֶּנָּה), and *then* he should be pelted with stones (cf. *Chidushei HaRan; Rabbeinu Yonah*).]

38. The word אוֹ, *or*, conveys a break between *hurling* and *stoning*. It teaches that the court need not necessarily apply both these methods; should the offender die from hurling alone [the first stage of the execution process], this is sufficient (see *Chidushei HaRan*).

39. [Up to this point, the Baraisa has spoken only of the penalty to be administered to those who touched the mountain during the revelation at Sinai. The Baraisa now teaches that the same procedures are to be followed in every case that the Torah mandates the penalty of סְקִילָה, *stoning*.]

תַּלְמוּד לוֹמַר ,,סָקוֹל יִסָּקֵל״ – For THE TORAH STATES: *HE SHALL SURELY BE STONED.*[1]

The Gemara cites the next part of our Mishnah:

וְאִם לָאוּ עַד הַשֵּׁנִי נוֹטֵל אֶת הָאֶבֶן – IF the condemned person has NOT died from the fall, THE SECOND WITNESS PICKS UP THE STONE [and casts it upon his chest].

The Gemara questions this:

נוֹטֵל – Is it really so that only **[the second witness] picks up** this stone, lifting it through his own power alone? וְהָתַנְיָא – **But it was taught in a Baraisa:** רַבִּי שִׁמְעוֹן בֶּן אֶלְעָזָר אוֹמֵר – R' SHIMON BEN ELAZAR SAYS: אֶבֶן הָיְתָה שָׁם – THERE WAS A STONE prepared in THAT AREA [i.e. at the execution site], מְשׁוּי שְׁנֵי בְנֵי אָדָם – and its WEIGHT was such that TWO MEN were required to carry it. נוֹטְלָהּ – HE WOULD PICK IT UP, וְנוֹתְנָהּ עַל לִבּוֹ – AND THROW IT ON THE CHEST OF [THE CONDEMNED], אִם מֵת בָּהּ יָצָא – and IF HE DIES FROM THIS, IT IS SUFFICIENT. Evidently, then, the stone used for the execution was too heavy for one man to wield; yet our Mishnah teaches that the second witness would take the stone and cast it down by himself! – ? –

The Gemara replies:

וְלִיטַּעֲמֵיךְ – **But according to your reasoning,** why did you direct your question at our Mishnah? תִּיקְשֵׁי לָךְ הֵיא גּוּפָא – **[This Baraisa] you have cited is itself problematic for you.** On the one hand it states that מְשׁוּי שְׁנֵי בְנֵי אָדָם – the stone's WEIGHT was such that TWO MEN were required to carry it. But then it also states that נוֹטְלָהּ וְנוֹתְנָהּ עַל לִבּוֹ – HE [singular] WOULD TAKE IT AND THROW IT ON THE CHEST OF [THE CONDEMNED]![2] אֶלָּא דְּמַדְלֵי לָהּ בַּהֲדֵי חַבְרֵיהּ – **Rather,** you must say **that [the witness] picks it up along with his fellow** [the other witness], וְשָׁדֵי לָהּ אִידְּוּ – **and then he** himself **casts it** down,[3] כִּי הֵיכִי דְּתֵיתֵי מְרַוַּחַ – **so that [the stone] will come** down upon the condemned more **forcefully.**[4]

The Mishnah stated:

וְאִם לָאוּ רְגִימָתוֹ וכו׳ – IF the condemned has NOT died as a result of the stone cast upon him by the witnesses, HIS STONING IS carried out etc. [by all of Israel. . .].

The Gemara questions:

וְהָתַנְיָא – But it was taught in a Baraisa: מֵעוֹלָם לֹא שָׁנָה בָּהּ אָדָם – IT NEVER HAPPENED THAT A PERSON REPEATED [THE STONING PROCEDURE].[5]

The Gemara replies:

מִי קָאָמִינָא דְּעָבִיד – Did I state [i.e. did the Mishnah state] that it actually happened that way? דְּאִי מִיצְּרִיךְ קָאָמִינָא – I have only stated that the congregation is to stone the condemned *if* this is necessary; if it is never necessary, then it need not be done.

The Gemara returns to examine a Baraisa cited earlier:

אָמַר מַר – The master said: אֶבֶן הָיְתָה כוּ׳ – THERE WAS A STONE prepared in THAT AREA [i.e. at the execution site. . .] etc.

This language implies that there was a specific boulder at the stoning grounds that was always used for the stoning procedure. The Gemara now questions this:

וְהָתַנְיָא – But it was taught in another Baraisa: אַחַת אֶבֶן שֶׁנִּסְקַל בָּהּ – WHETHER IT WAS THE STONE THAT [THE CONDEMNED] WAS STONED WITH, וְאַחַת עֵץ שֶׁנִּתְלָה עָלָיו – OR THE BEAM ON WHICH HE WAS HUNG, וְאֶחָד סַיִיף שֶׁנֶּהֱרַג בּוֹ – OR THE SWORD WITH WHICH HE WAS BEHEADED, וְאֶחָד סוּדָר שֶׁנֶּחֱנַק בּוֹ – OR THE SCARF WITH WHICH HE WAS STRANGLED – כּוּלָּן נִקְבָּרִין עִמּוֹ – ALL THESE instruments of execution ARE BURIED WITH HIS CORPSE.[6] How, then, could it be that there was a certain stone that was used more than once?

The Gemara replies:

לֹא צְרִיכָא – No! [The ruling] of the Baraisa is needed only to teach דְּמִתְּקָנֵי וּמַיְיתֵי אַחֲרִינֵי חִלּוּפֵיהּ – that after one stone is buried, they would prepare another one and bring it to the stoning grounds to take its place.[7]

NOTES

1. The exposition is based on the fact that the verse stated the verb in the future tense, implying an application to future generations (Rashi). Had Scripture not meant to allow for this interpretation, it could have stated the verb in imperative form [סְקֹל] (see *Rashash;* cf. *Ran*).

2. This implies that only one of the two witnesses handled the stone; yet the Tanna just said that the stone was too heavy for one person to carry!

3. This is done without the assistance of the other witness who helped him pick it up.

4. If the witnesses were to attempt to throw the stone together, this would likely cause the stone to travel with *less* velocity. This is because the two would find it difficult to precisely coordinate the moment of release — at the moment one is casting the stone down, the other is still grasping it. The Mishnah and Baraisa thus teach that after the two witnesses have picked up the stone together, one removes his hands from it and the other casts it down upon the condemned (*Rashi;* cf. *Yad Ramah;* see *Aruch LaNer* here).

5. [The Mishnah seems to imply that at times the witness' casting of the stone upon the condemned would not kill him. This seems to contradict the Baraisa, which states that it was never necessary to "repeat" the stoning procedure. That is, after the witness had hurled the stone, it was never necessary for the assembled congregation to finish the stoning process.]

NOTES

6. This law is derived from *Deuteronomy* 21:23, which states: לֹא־תָלִין נִבְלָתוֹ עַל־הָעֵץ כִּי־קָבוֹר תִּקְבְּרֶנּוּ, *You shall not allow his body to remain [hanging] on the beam [all night]; rather, you shall surely bury him.* The redundancy in the words קָבוֹר תִּקְבְּרֶנּוּ is taken to convey that the beam itself shall be buried, too (46b). The same applies to other instruments of execution — e.g. the stone, sword and scarf (see *Rashi;* see *Rabbeinu Yonah*).

Rambam (*Hil. Sanhedrin* 15:9) explains the rationale behind the burial of these items. Had these items remained extant, they would have become a source of posthumous disgrace to the executed convict; passersby who saw them would remark, "This is the instrument with which so-and-so was killed." The Torah therefore ordained that these instruments be buried, in consideration of the man's dignity. [As a general rule, however, nothing extraneous is buried in the grave of a deceased person (*Margaliyos HaYam*).]

7. I.e. when the Baraisa states that "there was a stone in that area," it does not mean that a *particular* stone was always there; it means that a stone was always there in advance, having been placed there immediately after the previous execution.

Mishnah This Mishnah and the two that follow delineate the procedure for the other forms of execution:

מִצְוַת הַנִּשְׂרָפִין – This is the procedure for those who are burned: הָיוּ מְשַׁקְּעִין אוֹתוֹ בְּזֹהַל עַד אַרְכּוּבוֹתָיו – They would submerge him in manure up to his knees,[7] וְנוֹתְנִין סוּדָר קָשֶׁה לְתוֹךְ הָרַכָּה וְכוֹרְכִין עַל צַוָּארוֹ – and place a coarse scarf inside a soft one and wind it around his neck.[8] זֶה מוֹשֵׁךְ אֶצְלוֹ וְזֶה מוֹשֵׁךְ אֶצְלוֹ – This one pulls toward himself and this one pulls toward himself[9] עַד שֶׁפּוֹתֵחַ אֶת פִּיו – until he opens his mouth. וּמַדְלִיק אֶת הַפְּתִילָה – One lights a wick[10] וְזוֹרְקָהּ לְתוֹךְ פִּיו – and throws it into his mouth, וְיוֹרֶדֶת לְתוֹךְ מֵעָיו וְחוֹמֶרֶת אֶת בְּנֵי מֵעָיו – and it descends into his stomach and burns his intestines.

This procedure is disputed:

רַבִּי יְהוּדָה אוֹמֵר – R' Yehudah says: אַף הוּא אִם מֵת בְּיָדָם – But if he should die by their hands, i.e. by strangulation, **לֹא הָיוּ מְקַיְּימִין בּוֹ מִצְוַת שְׂרֵיפָה – they will not have fulfilled the commandment of burning![11] אֶלָּא פּוֹתֵחַ אֶת פִּיו בְּצִבַּת שֶׁלֹּא בְּטוֹבָתוֹ – Rather, one** pries **open his mouth with tongs against his will, וּמַדְלִיק אֶת הַפְּתִילָה – and** the other **one lights a wick, וְזוֹרְקָהּ לְתוֹךְ פִּיו – throws it into his mouth, וְיוֹרֶדֶת לְתוֹךְ מֵעָיו וְחוֹמֶרֶת אֶת בְּנֵי מֵעָיו – and it descends into his stomach and burns his intestines.**

All agree, however, that the burning is effected internally. This is questioned:

אָמַר רַבִּי אֶלְעָזָר בֶּן צָדוֹק – R' Elazar ben R' Tzadok said: מַעֲשֶׂה בְּבַת כֹּהֵן אַחַת שֶׁזִּנְּתָה – An incident once occurred **with the daughter of a Kohen that committed adultery, וְהִקִּיפוּהָ חֲבִילֵי זְמוֹרוֹת וּשְׂרָפוּהָ – and they surrounded her with bundles of branches and burned her.** Apparently *this* is the proper procedure for burning. **אָמְרוּ לוֹ מִפְּנֵי שֶׁלֹּא הָיָה בֵּית דִּין שֶׁל אוֹתָהּ שָׁעָה בָּקִי – They said to him:** That was **because the court at that time was not expert.[12]**

11a

NOTES

7. This prevents him from jumping around and causing the molten lead (see below) to pour out on his flesh rather than down his throat (*Rashi;* cf. *Yad Ramah*).

8. They wrap a soft scarf around a coarse one and then tighten it around his throat to force open his mouth. A soft scarf alone would not achieve the desired result, while a strong coarse cloth would abrade his neck and unduly disfigure him. Therefore, this combination is used (*Rashi*).

9. Each of the two witnesses who testified to his crime takes one end of the doubled cloth and pulls it towards himself (*Rambam, Hil. Sanhedrin* 15:3).

10. One of the witnesses performs this task (*Rambam, Hil. Sanhedrin* 15:3). The Gemara will discuss the nature of the wick.

11. If scarves are used, the condemned may well die from choking before the wick is dropped in, and the commandment to burn him will not have been fulfilled (*Rashi*).

12. They were Sadducees, who rejected the Oral Tradition and explained the written Torah literally (*Rashi* from 52b). Accordingly, that incident proves nothing.

The Gemara continues:

אִימְרָתָא בַּת טָלַי בַּת כֹּהֵן שְׁזִינְתָּה חֲוָאי – Imrasa the daughter of Tali was a Kohen's daughter who committed adultery. אַקְּפָה רַב חָמָא בַּר טוֹבִיָּה חֲבִילֵי זְמוֹרוֹת וְשָׂרְפָה – Rav Chama bar Toviah[2] had her surrounded with bundles of branches and burned her. אָמַר רַב יוֹסֵף – Rav Yosef said: טָעָה בְּתַרְתֵּי – He erred on two scores. Firstly, טָעָה בִּדְרַב מַתְנָה – he erred in regard to [the ruling] of Rav Masnah that execution by burning according to Torah law is effected by means of molten lead.[3] **וְטָעָה בִּדְתַנְיָא –** And secondly, **he erred in regard to** the ruling of **the** following **Baraisa: וּבָאתָ אֶל־הַכֹּהֲנִים הַלְוִיִּם וְאֶל־הַשֹּׁפֵט אֲשֶׁר יִהְיֶה בַּיָּמִים הָהֵם'' –** Scripture states: ***AND YOU SHALL COME TO THE KOHANIM, THE LEVIIM AND TO THE JUDGE WHO WILL BE IN THOSE DAYS.***[4] Kohanim are herein linked to judgment. This teaches that **בִּזְמַן שֶׁיֵּשׁ כֹּהֵן יֵשׁ מִשְׁפָּט – WHEN THERE IS A KOHEN** serving in the Temple, **THERE IS JUDGMENT** of capital offenses, **בִּזְמַן שֶׁאֵין כֹּהֵן אֵין מִשְׁפָּט –** but **WHEN THERE IS NO KOHEN** serving in the Temple, for example, when it is in a state of destruction, **THERE IS NO JUDGMENT** of capital offenses. Based on this Baraisa, Rav Chama had no right to carry out capital punishment, since he lived after the destruction of the Temple.[5]

The Gemara quotes the last segment of the Mishnah:

אָמַר רַבִּי אֶלְעָזָר בְּרַבִּי צָדוֹק מַעֲשֶׂה בְּבַת כֹּהֵן שְׁזִינְתָּה וכו' – R' ELAZAR THE SON OF R' TZADOK SAID: IT ONCE OCCURRED WITH THE DAUGHTER OF A KOHEN THAT SHE COMMITTED ADULTERY, etc. [and they surrounded her with bundles of branches and burned her. They said to him: That was because the court at that time was not expert].

The Gemara explains the Sages' response:

אָמַר רַב יוֹסֵף בֵּית דִּין שֶׁל צְדוּקִים הָיָה – Rav Yosef said: The Sages replied: **It was a court of Sadducees** who did this, who reject the Oral Tradition (i.e. the *gezeirah shavah* cited on 52a) and interpret the Torah in a literal fashion. Thus, that incident proves nothing.

The Gemara asks:

הֲכִי אָמַר לְהוּ וְהָכִי אֲהַדְּרוּ לֵיהּ – Indeed, **is this what [R' Elazar] said to [the Sages], and what they replied to him?** וְהָתַנְיָא – **But it was taught in a Baraisa:** אָמַר רַבִּי אֶלְעָזָר בְּרַבִּי צָדוֹק – **R' ELAZAR THE SON OF R' TZADOK SAID:** זְכוּרַנִי כְּשֶׁהָיִיתִי תִּינוֹק וּמוּרְכָּב עַל כְּתֵיפּוֹ שֶׁל אַבָּא – **I RECALL, WHEN I WAS A SMALL CHILD AND WAS RIDING ON THE SHOULDER OF MY FATHER,** וְהֵבִיאוּ בַּת כֹּהֵן שֶׁזִּינְתָה – **THAT THEY BROUGHT** out **A KOHEN'S DAUGHTER WHO HAD COMMITTED ADULTERY** וְהִקִּיפוּהָ חֲבִילֵי זְמוֹרוֹת וְשָׂרְפוּהָ – **AND SURROUNDED HER WITH BUNDLES OF BRANCHES AND BURNED HER** entire body. אָמְרוּ לוֹ – **[THE SAGES] REPLIED TO HIM:** קָטָן הָיִיתָ – **YOU WERE A MINOR** at that time, וְאֵין מְבִיאִין רְאָיָה מִן הַקָּטָן – **AND ONE CANNOT ADDUCE SUPPORT FROM** the testimony of **A MINOR.** Thus we see that the reason the Sages rejected R' Elazar's testimony was because he was a minor, and not, as the Mishnah records, because the court was composed of Sadducees. – ? –

The Gemara reconciles the contradiction:

שְׁנֵי מַעֲשִׂים הָיוּ – **These were two** different **occurrences.** One time they rejected his testimony because it concerned a time when he was a minor (the case of the Baraisa), and one time they rejected his testimony because he had witnessed a Sadducee court (the case of the Mishnah).

The Gemara inquires:

הֵי אָמַר לְהוּ בְּרִישָׁא – Now **which** incident **did [R' Elazar] relate to [the Sages] first?** **אִילֵימָא הָא קַמַּיְיתָא אָמַר לְהוּ בְּרִישָׁא** – **If you say he originally related to them the** incident **first** mentioned in this discussion (i.e. the occurrence recorded in the Mishnah), **אָמַר לְהוּ כְּשֶׁהוּא גָּדוֹל וְלֹא אַשְׁגּוּחוּ בֵּיהּ** – is it possible that after **he related to them** that which he witnessed **as an adult and they paid no attention to him,** **אָמַר לְהוּ כְּשֶׁהוּא קָטָן וְאַשְׁגּוּחוּ בֵּיהּ** – **he would** then **relate to them** an incident he witnessed **as a minor and expect that they would listen to him?** **אֶלָּא הָא אָמַר לְהוּ בְּרִישָׁא** – **Rather,** we must say that **he related to them this one** [the incident recorded in the Baraisa] **first,** **וְאָמְרוּ לֵיהּ קָטָן הָיִיתָ** – **and they told him: "You were a minor** and therefore we cannot accept what you are saying." **וְאָמַר לְהוּ כְּשֶׁהוּא גָּדוֹל** – **Then he told them** what he had witnessed **when he was an adult,** **וְאָמְרוּ לֵיהּ מִפְּנֵי שֶׁלֹּא הָיָה בֵּית דִּין שֶׁל אוֹתָהּ שָׁעָה בָּקִי** – **and they replied to him:** "We cannot accept this proof either, **BECAUSE THE COURT AT THAT TIME WAS NOT EXPERT,**" i.e. it was a court of Sadducees.

NOTES

2. Who lived during the Amoraic period [after the destruction of the second Temple] (*Rashi*).

3. [See *Chidushei HaRan* who discusses why Rav Yosef did not say that Rav Chama erred in regard to the Mishnah, which states clearly that burning is effected by dropping a burning wick down the condemned's throat.]

4. *Deuteronomy* 17:9.

5. For a vindication of Rav Chama, see *Chochmas Shlomo (Maharshal)*; cf. *Margaliyos HaYam*.

[*Tosafos* note that the Gemara could just as well have cited the more commonly quoted teaching that capital punishment can be administered only when the Great Sanhedrin operates out of its quarters in the Temple — see 14b and 87a. *Rashi* also appears to refer to this teaching. For a discussion of why two teachings are needed, see *Meromei Sadeh* loc. cit., *Chazon Ish, Shviis* 3:16, and *Chidushim U'Biurim*. See also *Rambam, Hil. Sanhedrin* 14:11).]

Mishnah מִצְוַת הַנֶּהֱרָגִין – This is the procedure for those who are beheaded: הָיוּ מְתִיזִין אֶת רֹאשׁוֹ בְּסַיִף – They would decapitate him with a sword, in the manner in which the government does.[6] בְּדֶרֶךְ שֶׁהַמַּלְכוּת עוֹשָׂה – R' Yehudah says: רַבִּי יְהוּדָה אוֹמֵר – It is a disgrace for him![7] נִיוּוּל הוּא לוֹ – Rather, they place his head on a block[8] and chop it off with an ax. אֶלָּא מְנִיחִין אֶת רֹאשׁוֹ עַל הַסַּנְדָּן וְקוֹצְצִין בְּקוֹפִיץ – They said to him: There is no more disgraceful manner of death than this![9] אָמְרוּ לוֹ אֵין מִיתָה מְנֻוָּלֶת מִזּוּ

17a

NOTES

6. When the condemned was standing, they would cut off his head from the front, severing his trachea and esophagus and killing him instantly (*Meiri*). This was the manner in which civil authorities [i.e. the Roman government] of that time would behead their convicts.

7. The Gemara initially understands R' Yehudah to mean that it is disgraceful for him to be decapitated so that his body falls to the ground from a standing position (*Rashi*).

8. A thick wooden block held steady by being inserted into the ground (*Rashi*).

9. Because the blade of an ax is not as sharp as that of a sword and it smashes part of the neck rather than cutting it cleanly (*Yad Ramah*).

Gemara A Baraisa records R' Yehudah's response:

אָמַר לָהֶן רַבִּי – **It was taught in a Baraisa:** תַּנְיָא

אַף אֲנִי יוֹדֵעַ – **R' YEHUDAH SAID TO THE SAGES:** יְהוּדָה לַחֲכָמִים

שְׁמִיתָה מְגוֹלֶלֶת הִיא – **I ALSO KNOW THAT IT** [my method of decapitation] **IS A DISGRACEFUL DEATH.** אֲבָל מָה אֶעֱשֶׂה – **BUT WHAT CAN I DO,** שֶׁהֲרֵי אָמְרָה תוֹרָה ,,וּבְחֻקֹּתֵיהֶם לֹא תֵלֵכוּ'' – **SEEING THAT THE TORAH HAS SAID:** ***NEITHER SHALL YOU WALK IN THEIR ORDINANCES?***[10] Following the gentile practice of beheading by the sword is, therefore, forbidden.[11]

The Gemara records the Rabbis' response to this:

וְרַבָּנָן – **But the Rabbis** assert: כֵּינָן דִּכְתִיב סַיִיף בְּאוֹרַיְיתָא – **Since** beheading by **the sword is written in the Torah,**[12] לָא מִינַּיְיהוּ קָא גָּמְרִינַן – **we do not** in fact **derive** this practice **from them.** Accordingly, no violation of *neither shall you walk in their ordinances* has been committed.[13] דְּאִי לָא תֵּימָא הָכִי – **For if you do not say so,**[14] הָא דְּתַנְיָא שׂוֹרְפִין עַל הַמְּלָכִים וְלֹא מִדַּרְכֵי הָאֱמוֹרִי – regarding **that which was taught in a Baraisa: WE BURN** the personal articles **OF** deceased **KINGS,**[15] **AND THIS** does **NOT** entail a violation of the prohibition to follow in **THE WAYS OF THE EMORITES,** הֵיכִי שָׂרְפִינַן – **how may we** in fact **burn** these articles? וְהָכְתִיב ,,וּבְחֻקֹּתֵיהֶם לֹא תֵלֵכוּ'' – **Is it not written:** ***neither shall you walk in their ordinances,*** and it is the gentile custom to burn the personal articles of deceased kings? אֶלָּא כֵּינָן דִּכְתִיב שְׂרֵיפָה בְּאוֹרַיְיתָא – **Rather,** we must say that **since** the practice of **burning** for deceased kings **is recorded in the Torah,** דִּכְתִיב – **as it is written** in regard to King Tzidkiyahu: ,,וּבִמְשְׂרֻפוֹת אֲבוֹתֶיךָ וגו'' – ***and like the pyres of your fathers*** **etc.** [*that preceded you, so shall they make a pyre for you*],[16] לָאו מִינַּיְיהוּ קָא גָּמְרִינַן – **we do not derive** this custom **from [the gentiles].** Therefore, no violation is involved. וְהָכָא נָמִי – **Then here also,** כֵּינָן דִּכְתִיב סַיִיף בְּאוֹרַיְיתָא לָאו מִינַּיְיהוּ קָא גָּמְרִינַן – **since** execution by **the sword is recorded in the Torah, we do not derive** this practice **from them.** Hence, no violation is involved.[17]

The Mishnah below (76b) lists two sins for which the penalty of beheading is administered. The Gemara investigates the sources for these:

וְהָא דְּתָנַן בְּאִידָּךְ פִּירְקִין – **Now** in regard to **that which we learned in a Mishnah in the other chapter:**[18] אֵלּוּ הֵן הַנֶּהֱרָגִין – **THESE ARE THE ONES WHO ARE BEHEADED:** הָרוֹצֵחַ – **A MURDERER** וְאַנְשֵׁי עִיר הַנִּדַּחַת – **AND THE PEOPLE OF A SUBVERTED CITY,** בְּשֶׁלָּמָּא עִיר הַנִּדַּחַת כְּתִיב בַּהּ ,,לְפִי־חָרֶב״ – **it is well** that the people of **a subverted city** are beheaded, for **it is written concerning them:** *Smite the inhabitants of that city* ***by the edge of the sword.***[19] אֶלָּא רוֹצֵחַ מְנָלָן – **But** as far as **a murderer, from where do we derive** that he is beheaded?

The Gemara responds:

דְּתַנְיָא – **For it was taught in a Baraisa:** ,,נָקֹם יִנָּקֵם״ – Scripture states: *And if a man shall strike his slave or his maidservant with the rod and he shall die under his hand,* ***HE SHALL BE AVENGED.***[20] נְקִימָה זוֹ אֵינִי יוֹדֵעַ מַה הִוא – Now without elaboration, **I DO NOT KNOW WHAT FORM THIS "VENGEANCE"** should take, i.e. what method of execution should be employed. כְּשֶׁהוּא אוֹמֵר ,,וְהֵבֵאתִי עֲלֵיכֶם חֶרֶב נֹקֶמֶת נְקַם־בְּרִית״ – But **WHEN IT STATES:** ***I WILL BRING UPON YOU A SWORD, AVENGING THE VENGEANCE OF THE COVENANT,***[21] הֲוֵי אוֹמֵר נְקִימָה זוֹ סַיִיף – **I CONCLUDE** that **"VENGEANCE" IMPLIES** death by **THE SWORD.** Thus, we see that the punishment for murder is death by the sword.

The Gemara asks:

וְאֵימָא דְּבָרִיז לֵיהּ מִיבְּרַז – **But perhaps say** that the intent of the Torah is that **he should be stabbed.**[22] – ? –

The Gemara answers:

לְפִי־חֶרֶב״ כְּתִיב ,, – **For it is written** in regard to the people of a subverted city that they should be executed ***by "the edge" of the sword***. This indicates slicing, not stabbing.[23]

The Gemara asks:

וְאֵימָא דְּעָבִיד לֵיהּ גִּיסְטְרָא – **Then** perhaps we should **say he is cut in half** lengthwise. – ? –

The Gemara responds:

אָמַר רַב נַחְמָן אָמַר רַבָּה בַּר אֲבוּהּ אָמַר קְרָא – **Rav Nachman said in the name of Rabbah bar Avuha: Scripture states:** ,,וְאָהַבְתָּ לְרֵעֲךָ כָּמוֹךָ״ – ***And you shall love your fellow as yourself***[24] – בְּרוֹר לוֹ מִיתָה יָפָה – **choose for him a favorable death.**[25]

The Gemara asks:

אַשְׁכְּחַן דְּקָטַל עַבְדָּא – **We have** thus far **found** a source for beheading **one who killed a slave.** בַּר חוֹרִין מְנָא לָן – **From where do we derive** beheading for killing **a free man?**[26]

The Gemara responds:

וְלָאו קַל וָחוֹמֶר הוּא – **But is it not** derivable via **a *kal vachomer*?** קָטַל עַבְדָּא בְּסַיְיף – If **one who killed a** mere **slave** is executed **by the sword,** בַּר חוֹרִין בְּחֶנֶק – should one who killed **a free man** be executed **by** the less severe method of **strangulation?**

The Gemara qualifies its question:

הָנִיחָא לְמַאן דְּאָמַר חֶנֶק קַל – **This** response **is understandable according to the one who maintains** that **strangulation is** a more **lenient** penalty than beheading. אֶלָּא לְמַאן דְּאָמַר חֶנֶק חָמוּר מַאי אִיכָּא לְמֵימַר – **But according to the one who maintains** that **strangulation is** more **severe, what can be said?**

The Gemara responds:

נָפְקָא לֵיהּ מִדְּתַנְיָא – **He derives it from that which was taught in a Baraisa:** ,,וְאַתָּה תְּבַעֵר הַדָּם הַנָּקִי מִקִּרְבֶּךָ'' – Scripture states: ***AND YOU SHALL PURGE THE INNOCENT BLOOD FROM YOUR MIDST.***[27] הוּקְשׁוּ כָּל שׁוֹפְכֵי דָמִים לְעֶגְלָה עֲרוּפָה – **ALL SHEDDERS OF BLOOD ARE** herein **COMPARED TO THE *EGLAH ARUFAH.***[28] מָה לְהַלָּן [בְּסַיִיף וּ]מִן הַצַּוָּאר – **JUST AS THERE** the death of the calf is effected **[WITH A SWORD AND[29]] FROM THE NECK,** אַף כָּאן בְּסַיִיף וּמִן הַצַּוָּאר – **SO TOO HERE** in regard to the execution of a murderer, it should be performed **WITH A SWORD AND FROM THE NECK.**

The Gemara asks:

אִי מָה לְהַלָּן בְּקוֹפִיץ וּמִמּוּל עוֹרֶף – But **if** we compare the execution of a murderer to the decapitation of the calf, we should compare it precisely, as follows: **Just as there** the death of the calf is effected **with an *ax* and from the *back* of the neck,** אַף כָּאן בְּקוֹפִיץ וּמִמּוּל עוֹרֶף – **so too here** in regard to the execution of a murderer, it should be performed **with an *ax* and from the *back* of the neck.** – ? –

The Gemara responds:

אָמַר רַב נַחְמָן אָמַר רַבָּה בַּר אֲבוּהּ אָמַר קְרָא – **Rav Nachman said in the name of Rabbah bar Avuha: Scripture states:** ,,וְאָהַבְתָּ לְרֵעֲךָ כָּמוֹךָ'' – ***And you shall love your fellow as yourself*** – בְּרוֹר לוֹ מִיתָה יָפָה – **choose for him a favorable death.**[30]

NOTES

10. *Leviticus* 18:3. This is an admonition not to imitate the customs of the gentile nations.

11. It emerges from this Baraisa that when R' Yehudah said to the Rabbis, "It is disgraceful for him," he actually meant that it is disgraceful to imitate the gentile method of execution. The Rabbis, however, misunderstood him to mean that their method was disgraceful *per se*. They therefore responded to him that his method was even *more* disgraceful (*Ran*).

12. In regard to a subverted city (עִיר הַנִּדַּחַת) it is written (*Deuteronomy* 13:16): *Lay it waste. . . with the edge of the sword (Yad Ramah).*

13. [Since our practice stems from the Torah, we are not imitating them. There is no reason for us to abandon a practice of the Torah merely because the gentiles have adopted a similar one.]

14. [That whenever there is a Biblical source for a certain conduct, there is no violation of *neither shall you walk in their ordinances* even in a case where this conduct coincides with the custom of the non-Jewish nations.]

15. When a king dies, his bed and his personal effects are burned (*Rashi*) out of respect to him, so that no one else should use them (*Rambam, Hil. Melachim* 2:1).

16. *Jeremiah* 34:5. See 46b note 53; see also *Hagahos Ya'avetz* there.

17. R' Yehudah, on the other hand, maintains that since the Torah's requirement to behead by the sword can be fulfilled by using an ax as well [for the ax blade is a form of a "sword"], employing a sword constitutes following a gentile practice. The Rabbis argue, however, that since both a sword and an ax are included in the Torah's use of the word "sword," we cannot be said to be imitating their ways by opting for the sword (*Yad Ramah;* see also *Tosafos* to *Avodah Zarah* 11a ד"ה ואי חוקה). [For further discussion of the prohibition of following gentile customs, see *Tosafos* here and to *Avodah Zarah* 11a ד"ה ואי חוקה, *Ran* and *Meiri* here and *Yoreh Deah* 178 with commentaries.]

NOTES

18. Chapter 9, on 76b.

19. *Deuteronomy* 13:16.

20. *Exodus* 21:20. The verse speaks of a Canaanite slave, for whose murder the death penalty applies, since he is obligated to fulfill the mitzvos of the Torah incumbent upon a Jewish female (*Rashi*).

21. *Leviticus* 26:25.

22. How is it indicated that the sword is to be used for beheading? Perhaps the condemned should be stabbed in the stomach or neck with it (*Rashi*).

23. *Psalms* 149:6 speaks of חֶרֶב פִּיפִיּוֹת, *a double-edged sword*, indicating that there are two edges. Thus, the expression "by the edge of the sword" must refer to the sword's long side, to which there are two edges, not to the point, of which there is only one (*Rashi* with *Maharsha*).

24. *Leviticus* 19:18.

25. Since we have the option of executing the condemned by beheading him or splitting him lengthwise in two, it is preferable that he be beheaded, because this is not as gruesome a death (*Yad Ramah*).

NOTES

26. The verse *he shall be avenged,* from which the punishment of beheading for murder was derived, refers to the murder of a slave. In regard to the murder of a free man, however, the verse states simply (*Numbers* 35:17): מוֹת יוּמַת רֹצֵחַ, *The murderer shall be put to death,* and, as we learned above, wherever the Torah does not specify any particular method of execution, the perpetrator is strangled. There seems, therefore, to be no source that a murderer of a free man is beheaded (*Rashi*).

27. *Deuteronomy* 21:9. This verse appears at the conclusion of the section of the *eglah arufah,* the decapitated calf. If the body of a murder victim is discovered outside a town in Eretz Yisrael and it is not known who killed him, the Torah requires the elders of the town nearest the body to take a calf that was never worked and bring it to a valley of unworked ground, where it is decapitated (ibid. 21:1-4).

28. From the verse *and you shall purge the innocent blood from your midst,* it is derived that if after the *eglah arufah* is decapitated the murderer is found, he is still put to death (see *Rashi* ad loc. and *Tosafos* to *Kesubos* 37b ד״ה ואח״כ). Since the killing of the murderer is hinted at here, it is regarded as compared to the *eglah arufah* (*Ran;* cf. *Rabbeinu Chananel* from *Yerushalmi* 7:3).

29. *Maharshal* deletes the bracketed words; see *Kesubos* 37b. See also *Dikdukei Sofrim.*

30. Since the Torah leaves open the choice of executing a murderer with a sword and from the front of the neck, or with an ax from the back of the neck, it is preferable that he be beheaded with the former method, because this is a swifter death (*Rashi* to *Kesubos* 37b ד״ה מיתה). See note 9.

Mishnah מִצְוַת הַנֶּחֱנָקִין – This is the procedure for those who are strangled: הָיוּ מְשַׁקְּעִין אוֹתוֹ בְּזֶבֶל עַד אַרְכּוּבוֹתָיו – They would submerge him in manure up to his knees,[31] וְנוֹתֵן סוּדָר קָשֶׁה לְתוֹךְ הָרַכָּה וְכוֹרֵךְ עַל צַוָּארוֹ – and place a coarse scarf inside a soft one and wind it around his neck. זֶה מוֹשֵׁךְ אֶצְלוֹ וְזֶה מוֹשֵׁךְ אֶצְלוֹ עַד שֶׁנַּפְשׁוֹ יוֹצֵאת – This [witness] pulls toward himself and this [witness] pulls toward himself – until his soul departs.[32]

Gemara The Gemara cites the source for strangulation as the punishment for adultery:

תָּנוּ רַבָּנָן – **The Rabbis taught in a Baraisa:** Scripture states: *A man who will commit adultery with a man's wife, who will commit adultery with his fellow's wife, the adulterer and the adulteress shall be put to death.*[33] ,,אִישׁ״ פָּרַט לְקָטָן – The expression *A MAN* EXCLUDES A MINOR from liability as an adulterer.[34] ,,אֲשֶׁר יִנְאַף אֶת־אֵשֶׁת אִישׁ״ פָּרַט לְאֵשֶׁת קָטָן – The expression *WHO WILL COMMIT ADULTERY WITH A MAN'S WIFE* EXCLUDES A MINOR'S WIFE.[35] ,,אֵשֶׁת רֵעֵהוּ״ פָּרַט לְאֵשֶׁת אֲחֵרִים – The phrase *WITH HIS FELLOW'S WIFE* EXCLUDES THE WIFE OF OTHERS.[36] The verse then concludes: ,,מוֹת יוּמַת״ – *[THEY] SHALL BE PUT TO DEATH.* בְּחֶנֶק – This means BY STRANGULATION. אַתָּה אוֹמֵר בְּחֶנֶק – YOU SAY it means BY STRANGULATION, אוֹ אֵינוֹ אֶלָּא בְּאַחַת מִכָּל מִיתוֹת הָאֲמוּרוֹת בַּתּוֹרָה – BUT PERHAPS it means BY ONE OF THE OTHER forms of DEATH MENTIONED IN THE TORAH?[37] אָמַרְתָּ – To this YOU MAY ANSWER: כָּל מָקוֹם שֶׁנֶּאֱמַר מִיתָה בַּתּוֹרָה סְתָם – WHENEVER putting to DEATH IS MENTIONED BY THE TORAH IN AN UNDEFINED MANNER, i.e. without specifying the type of death, אֵין אַתָּה רַשַּׁאי לְמוּשְׁכָהּ לְהַחֲמִיר עָלֶיהָ אֶלָּא לְהָקֵל עָלֶיהָ – YOU HAVE NO RIGHT TO INTERPRET IT[38] in such a manner so as TO BE STRINGENT WITH IT, BUT RATHER TO BE LENIENT WITH IT.[39]

דִּבְרֵי רַבִּי יֹאשִׁיָּה – These are THE WORDS OF R' YOSHIYAH. רַבִּי יוֹנָתָן אוֹמֵר – R' YONASON SAYS: לֹא מִפְּנֵי שֶׁהִיא קַלָּה – The reason an unspecified form of death is interpreted as being strangulation is NOT BECAUSE [STRANGULATION] IS the most LENIENT form of execution,[40] אֶלָּא כָּל מִיתָה הָאֲמוּרָה בַּתּוֹרָה סְתָם אֵינָהּ אֶלָּא חֶנֶק – BUT because we have a principle that WHENEVER putting to DEATH IS MENTIONED IN THE TORAH IN AN UNDEFINED MANNER, IT MEANS SPECIFICALLY STRANGULATION. רַבִּי אוֹמֵר – REBBI SAYS: R' Yonasan's principle is derived as follows: נֶאֱמַר מִיתָה בִּידֵי שָׁמַיִם – DEATH AT THE HAND OF HEAVEN IS MENTIONED in Scripture,[41] וְנֶאֱמַר מִיתָה בִּידֵי אָדָם – AND DEATH AT THE HAND OF MAN IS MENTIONED in Scripture.[42] מָה מִיתָה הָאֲמוּרָה בִּידֵי שָׁמַיִם מִיתָה שֶׁאֵין בָּהּ רוֹשֶׁם – JUST AS THE DEATH MENTIONED AT THE HAND OF HEAVEN is A type of DEATH THAT LEAVES NO outward MARK on the body of the deceased, אַף מִיתָה הָאֲמוּרָה בִּידֵי אָדָם מִיתָה שֶׁאֵין בָּהּ רוֹשֶׁם – SO TOO THE DEATH MENTIONED AT THE HAND OF MAN must be A DEATH THAT LEAVES NO MARK on the body of the one executed. This refers to execution by strangulation.

The Gemara asks:

וְאֵימָא שְׂרֵיפָה – But say, perhaps, that this refers to burning, because execution by burning also leaves no mark on the body.[43] – ? –

The Gemara answers:

מִדְּאָמַר רַחֲמָנָא בַּת כֹּהֵן בִּשְׂרֵיפָה – Since the Merciful One stated that a Kohen's adulterous daughter is executed by burning, מִכְּלָל דְּהָא לָאו בַּת שְׂרֵיפָה הִיא – it can be inferred that this one [a non-Kohen's daughter who commits adultery] is not subject to burning.[44]

NOTES

31. So that he would not jump around and impede the process, thereby prolonging his own agony (*Tiferes Yisrael;* cf. *Lechem Mishneh* to *Hil. Sanhedrin* 15:3).

32. [This is the same procedure as that used to force open the condemned's mouth for burning (see Mishnah 52a and note 8 there), except that in this case the witnesses continue to pull until the condemned is strangled to death.]

33. *Leviticus* 20:10.

34. The word *man* implies a full-grown man, not a minor. [See sources cited in the margin of the Vilna Shas and by *Gilyon HaShas,* who discuss why this requires a specific Scriptural derivation, since a minor is exempt from punishment for *any* transgression.] Cf. *Meromei Sadeh.*

35. It teaches that a minor cannot effect betrothal (*Rashi*). Consequently, his wife is not considered to be legally married to him, and it is not considered adultery when a stranger cohabits with her. Cf. *Tosafos* to *Kiddushin* 19a; see also *Rabbeinu Yonah* here and *Aruch LaNer.*

36. I.e. the wife of a non-Jew. If a Jewess "marries" a non-Jew, *kiddushin* does not take effect, and she is legally deemed a single woman. Consequently, if she cohabits with a Jew, it is not considered adultery (see *Rashi* here and to *Sotah* 26b ד"ה ובת כהן; see *Ran* at length for a discussion of *Rashi's* view; cf. *Tosafos* to *Sotah* ד"ה יצא and *Meromei Sadeh* here).

37. The Torah does not state, or even imply, that their death should be by strangulation; it simply decrees: [*They*] *shall be put to death*.

38. Literally: to draw it.

NOTES

39. The Gemara states later that R' Yoshiyah was in possession of a *Halachah LeMoshe MiSinai*, an oral tradition communicated to Moses at Sinai, which teaches the four methods of execution in order of stringency, and lists strangulation as the most lenient method (see, however, 53a note 2). Accordingly, the Torah did not need to specify when strangulation was intended. For it knew that lacking proof to the contrary, we would of necessity interpret any unspecified death as strangulation, because we would have no right to risk unjustly punishing the criminal too severely (*Rashi*).

40. R' Yonason is of the same opinion as R' Shimon (Mishnah on 49b) that beheading is more lenient than strangulation (*Rashi*, from Gemara below).

41. In regard to Divinely imposed premature death it states (*Genesis* 38:10): וַיָּמֶת גַּם־אותו, *And He caused him to die also* (*Rashi*).

42. I.e. cases of capital punishment in which the method of death is not specified (*Rashi*).

43. As taught by the Mishnah on 52a, execution by burning consists of swallowing hot lead. The body thus remains outwardly intact.

44. Consequently, the verse *the adulterer and the adulteress shall be put to death* must refer to strangulation (*Rashi*).

(20)

Supreme Court, U.S.
FILED
DEC 20 1999
CLERK

Dec 20 1999 (10)

No. 99-6723

THE SUPREME COURT OF THE UNITED STATES OF AMERICA

ANTHONY BRADEN BRYAN,
Petitioner,

-vs-

MICHAEL MOORE,
Secretary, Florida Department of Corrections,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF UNITARIAN UNIVERSALISTS AGAINST THE DEATH PENALTY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

John C. Sciaccotta*
William C. Graft
Thomas E. Jordan
Aaron W. Rapier
Mitchell J. Edlund
Graft, Sciaccotta and Associates
1900 East Golf Road, Suite 600
Schaumburg, Illinois 60173
(847) 330-2423

---

* Counsel of Record

12pp

TABLE OF CONTENTS

Question Presented iii

Table of Authorities iii

Interest of the *Amicus Curiae* 1

Summary of Argument 1

Argument 2

The Florida Supreme Court erred when it determined that the presence of conscious pain once electrocution begins is the only factor which determines whether or not Florida's use of the electric chair violates the cruel and unusual punishments clause of the Eight Amendment 2

A. CRUELTY IN THE JUSTIFICATION FOR ELECTROCUTION IS AS CONSTITUTIONALLY IMPERMISSIBLE AS CRUELTY IN THE METHOD OF EXECUTION. 3

B. SINCE THE VALIDITY OF RETRIBUTION AS A JUSTIFICATION FOR EXECUTION IS DEPENDENT UPON GUILT, EXONERATION RATES FACTOR INTO DETERMINATION WHETHER FLORIDA'S USE OF THE ELECTRIC CHAIR VIOLATES THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE. 5

Conclusion 7, 8

QUESTION PRESENTED

Did the Florida Supreme Court err in determining that the presence or absence of conscious pain once electrocution begins is the only factor which determines whether or not Florida's use of the electric chair constitutes cruel and unusual punishment under the Eight Amendment?

TABLE OF CASES

Callins v. Collins, 510 U.S. 1141, 114 S.Ct. 1127 (1994). 2, 3

Campbell v. Wood, 511 U.S. 1119, 114 S. Ct. 2125 (1994). 2

Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972). 2, 3, 5, 6

Gregg v. Georgia, 428 U.S. 227, 96 S.Ct. 2971 (1976). 3, 6

Heiney v. Florida, 469 U.S. 920, 105 S. Ct. 303 (1984). 5

Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853 (1993). 2, 3

Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319 (1977). 6

Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590 (1958). 6

Weems v. United States, 217 U.S. 349, 30 S.Ct. 544 (1910). 3, 4

Wilkerson v. Utah, 99 U.S. 130 (1879). 2

INTEREST OF THE AMICUS CURIAE

Unitarian Universalists Against the Death Penalty ("UUADP") is an independent affiliate of the Unitarian Universalist Association ("UUA").[1] UUADP was organized in 1996 to effectuate resolutions of the UUA calling for an end to capital punishment.

UUADP, as *amicus curiae,* adheres to the fundamental belief that the death penalty is inconsistent with UUADP's stated principle to affirm and promote the inherent worth and dignity of every individual. Florida's use of the electric chair is particularly abhorrent in the light of this principle. UUADP has members in thirty-nine of our United States of America.

SUMMARY OF ARGUMENT

Cruelty in the justification for execution is as constitutionally impermissible as cruelty in the method of execution.

Florida's continued use of the electric chair, despite its exoneration of nineteen death row inmates since 1973, evidences a cruelty in Florida's justification for execution.

Hence, the Florida Supreme Court erred when it determined that the presence of conscious pain once electrocution begins is the *only* factor, which determines whether Florida's continued use of the electric chair violates the cruel and unusual punishments clause.

---

[1] Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, the parties have consented to the filing of this *Amicus Curiae* brief. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, Unitarian Universalists Against the Death Penalty state that counsel for *amicus curiae* authored the brief in whole and no party made a monetary contribution to the preparation or submission of this brief other than *amicus curiae* and its counsel.

ARGUMENT

The Florida Supreme Court erred when it determined that the presence of conscious pain once electrocution begins is the *only* factor which determines whether Florida's continued use of the electric chair violates the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution.

Although, "[p]ain, certainly, *may* be a factor in the judgment [emphasis added]," Furman v. Georgia, 408 U.S. 238, 271, 92 S. Ct. 2726, 2742 (1972) (Brennan, J., concurring), "this Court has never held that pain is the exclusive consideration under the Eighth Amendment." Campbell v. Wood, 511 U.S. 1119, 114 S. Ct. 2125, 2127 (1994) *cert. denied*, (Blackmun, J., dissenting). What other considerations may be relevant under the Eighth Amendment, depend, of course, upon the meaning of the cruel and unusual punishments clause.

Although "difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted," Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879), and "the ban on "cruel and unusual punishments" is one of the most difficult to translate nto judicially manageable terms," 408 U.S. at 376 (Burger, J., dissenting), this Court has accepted that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." Herrera v. Collins, 506 U.S. 390, 419, 113 S. Ct. 853, 870 (1993) (O'Connor, J., concurring). Hence, evidence of legal and factual innocence would certainly be relevant to the determination of whether a punishment comports with the cruel and unusual punishments clause of the Eighth Amendment.

A. CRUELTY IN THE JUSTIFICATION FOR ELECTROCUTION IS AS CONSTITUTIONALLY IMPERMISSIBLE AS CRUELTY IN THE METHOD OF EXECUTION.

"Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital, must be capable of wider application than the mischief which gave it birth." Weems v. United States, 217 U.S. 349, 373, 30 S. Ct. 544, 551 (1910). Presently, "mischief" exists in the form of "exercises of cruelty by laws other than those which inflicted bodily pain or mutilation." Indeed, in the State of Florida, "unlimited legislative power, itself, [has become] tempted [by] cruelty." Id.

"The objective in imposing [the death penalty] must" comport with human dignity. Gregg v. Georgia, 428 U.S. 227, 240, 96 S. Ct. 2971, 2977 (1976) (Marshall, J., dissenting). "More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings." Furman v. Georgia, 408 U.S. 238, 271, 92 S. Ct. 2726, 2742 (1972) (Brennan, J., concurring).

Today, a new "mischief" has raised its ugly head. Since 1973, David Keaton, Wilbert Lee, Freddie Pitts, Delbert Tibbs, Annibal Jaramillo, Anthony Brown, Joseph Green Brown, Anthony Ray Peek, Juan Ramos, Willie Brown, Larry Troy, William Jent, Earnest Miller, Robert Cox, James Richardson, Bradley P. Scott, Andrew Golden, Robert Hayes, and Sonia Jacobs have all been exonerated from Florida's death row.[2] Sonia Jacobs was convicted of murder and sentenced to death along with her accomplice, Jesse Tafero. Ms. Jacobs was exonerated and released from death row in 1992. Mr. Tafero was electrocuted by the State of Florida in 1990. Although these data may not conclusively establish a cruel and unusual punishment,[3] they certainly pertain to

---

[2] This data was provided by the Death Penalty Information Center, Richard C. Dieter, Executive Director.

[3] A death row inmate is never "innocent" under the definition of innocence espoused in Herrera v. Collins, 506 U.S. 390, 399, 113 S. Ct. 853, 859 (1993).

the determination of whether Florida's continued use of the electric chair creates a constitutionally unacceptable risk that a "legally and factually innocent person" may be electrocuted.

The cruel and unusual punishment clause was not intended to "prevent only an exact repetition of history." Weems, 217 U.S. at 372. Instead, the clause protects individuals from the unlimited power of the state to punish individuals without accountability to the very concept of human dignity, which underlies our Eighth Amendment.

Moreover, the protections afforded by the cruel and unusual punishments clause are not limited to methods of punishment alone because "[c]ruelty [has] become an instrument of tyranny; of zeal for a purpose, either honest or sinister." Id. at 374. Indeed, considerable conceptual difficulty would accompany any attempt by the State of Florida to assert that pain is the sole factor relevant to the Court's determination of whether electrocution is unconstitutional. Due to the fact that cruelty in the justification for electrocution is as constitutionally impermissible as cruelty in the method of execution, the Supreme Court of Florida erred when it held that conscious pain once electrocution begins is the *only* factor which determines whether Florida's use of the electric chair violates the cruel and unusual punishments clause of the Eighth Amendment.

B. SINCE THE VALIDITY OF RETRIBUTION AS A JUSTIFICATION FOR EXECUTION IS DEPENDENT UPON GUILT, EXONERATION RATES FACTOR INTO THE DETERMINATION OF WHETHER FLORIDA'S USE OF THE ELECTRIC CHAIR VIOLATES THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE.

Retribution is a legitimate justification for punishment, Callins v. Collins, 510 U.S. 1141, 114 S. Ct. 1127, 1128 (1994)

Therefore, neither Anthony Bryan nor the nineteen inmates exonerated from Florida's death row are "innocent."

cert. denied, (Scalia, J., concurring).[4] Retribution "serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy--of self-help, vigilante justice, and lynch law." Furman, 408 U.S. at 308 (Stewart, J., concurring).

However, retribution without guilt is as constitutionally impermissible as punishment without justification. Herrera, 506 U.S. at 433-34.[5]

> "Men may punish for any number of reasons, but the one reason that punishment is morally good or morally justifiable is that someone has broken the law. Thus, it can correctly be said that breaking the law is the *sine qua non* of punishment, or, in other words, that we may only tolerate punishment as it is imposed on one who deviates from the norm established by the criminal law."

Furman v. Georgia, 408 U.S. 238, 342-43, 92 S. Ct. 2726, 2742 (1972).

The finality of the electric chair provokes the relevance of Florida's exoneration rate. "There is simply no possibility of correcting a mistake." Heiney v. Florida, 469 U.S. 920, 921, 105 S. Ct. 303, 304 (1984) *cert. denied*, (Marshall, J., dissenting). "The horror of sending an innocent defendant to death is thus qualitatively different from the horror of falsely imprisoning that defendant." Heiney, 469 U.S. at 921. Certainly, "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."

---

[4] "[I]f [the people] merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual, and unhistorical contradictions within "the Court's Eighth Amendment jurisprudence" should not prevent them." Callins v. Collins, 510 U.S. 1141, 114 S. Ct. 1127, 1128 (1994) *cert. denied*, (Scalia, J., concurring).

[5] "The legitimacy of punishment is inextricably intertwined with guilt." Id.

Patterson v. New York, 432 U.S. 197, 208, 97 S. Ct. 2319, 2326 (1977). Nevertheless, the possibility of electrocuting a "legally and factually innocent person" *at least* factors into the determination of whether Florida's continued use of the electric chair violates the cruel and unusual punishment clause of the Eighth Amendment.

Although, the cruel and unusual punishments clause draws its meaning from "evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 599 (1958), public attitude alone is inconclusive of evolving standards of decency, unless the punishment condoned comports with human dignity. Gregg, 428 U.S. at 173, clearly, human dignity is the "basic concept underlying the Eighth Amendment." Trop, 356 U.S. at 100. "If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would by definition be acceptable means for designating society's moral approbation of a particular act." Furman, 408 U.S. at 344.

The concept of human dignity underlying the Eighth Amendment requires consideration of exoneration rates. Such contemplation should have been undertaken by the Supreme Court of Florida in rendering its decision in Provenzano v. Moore, No. 95, 973 (Fla. 1999). The Florida Supreme Court's exclusive inquiry into conscious pain extrapolated human dignity from the cruel and unusual punishments clause and acquiesced to the apparent public acceptance that a factually and legally innocent person may have to be executed in order to satisfy public outrage.

The Florida Supreme Court's exclusive focus on conscious pain was erroneous because cruelty in the justification for Florida's use of the electric chair is as constitutionally impermissible as cruelty in the method of execution. If the only factor relevant to the determination of whether Florida's use of the electric chair constitutes cruel and unusual punishment was the presence or absence of conscious pain once electrocution begins, then execution of a factually and legally innocent person would comport with the Eighth Amendment so long as their death was painless.

Certainly the concept of human dignity, which underlies our Eighth Amendment, would not countenance such a result.

CONCLUSION

Cruelty in the justification for electrocution is as constitutionally impermissible as cruelty in the method of execution. Since the validity of retribution as a justification for punishment depends upon guilt, exoneration rates in the State of Florida factor into the determination of whether the use of the electric chair in that state violates the cruel and unusual clause of the Eighth Amendment to the United States Constitution.

The Supreme Court of Florida has held that pain once electrocution begins is the only factor relevant to the determination of whether Florida's use of the electric chair constitutes a cruel and unusual punishment. In light of the constitutionally intolerable event that a factually and legally innocent person be executed, certainly other factors such as the exoneration of nineteen inmates from Florida's death row since 1973, are relevant to the determination of whether Florida's use of the electric chair violates the cruel and unusual punishment clause.

For the foregoing reasons, *amicus curiae*, Unitarian Universalists Against the Death Penalty respectfully submit that this Court reverse the Florida Supreme Court's decision in Provenzano v. Moore, No. 95, 973 (Fla. 1999).

Respectfully submitted,

John C. Sciaccotta
William C. Graft
Thomas E. Jordan
Aaron W. Rapier
Mitchell J. Edlund
Graft, Sciaccotta and Associates
1900 East Golf Road, Suite 600
Schaumburg, Illinois 60173
(847) 330-2423

Attorneys for *Amicus Curiae*
Unitarian Universalists Against the Death Penalty

Supreme Court, U.S.
FILED
DEC 20 1999

No. 99-6723

IN THE DEC 20 1999

Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

—v.—

MICHAEL MOORE, Secretary, Florida Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF *AMICUS CURIAE* OF THE LAW & HUMANITIES INSTITUTE IN SUPPORT OF PETITIONER

Prof. Richard H. Weisberg
(On the Brief)
Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, New York 10003
(212) 790-0299

Prof. Austin Sarat
Department of Political Science
and Law, Jurisprudence
& Social Thought
Amherst College
Amherst, Massachusetts 01002
(413) 542-2308

Edward de Grazia
(Counsel of Record)
The Law & Humanities Institute
757 Third Avenue, 18th Floor
New York, New York 10017
(212) 790-0276

340P

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT: 5

I. The Electric Chair: A Disillusioning History 5

II. "Decency" and "Dignity" 8

A. Electrified Pain: the Visible and the Invisible 9
B. Disfigurement 13

III. The Legitimacy of Law and the Barbarity of Electrocution 15

IV. When We are Made to See the Invisible: Stories About Execution and Electrocution 19

A. American Novelists on Electrocution 20
B. Kafka and Camus on the Essence of Execution 25

CONCLUSION 29

TABLE OF AUTHORITIES

Cases **Page(s)**

Buenoano v. State, 565 So.2d 309 (Sup. Ct. Fla. 1990). 14

Callins v Collins, 510 U.S. 1141 (1994). 18, 19

Glass v. Louisiana, 471 U.S. 1080 (1985). 3, 6, 12

Gregg v. Georgia, 428 U.S. 153 (1976). 12

Hill v. Lockhart, 791 F. Supp. 1388
(U.S.D.C. ED Ark.1992). 17

Jones v. State, 701 So.2d 76 (Sup. Ct. Fla. 1997). 15, 16

Kemmler, in Re, 136 U.S. 436 (1890). 16

LaGrand v. Stewart, 173 F.3d 1144 (9th Cir. 1999). 9, 10, 13

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). . . .6

Provenzano v. Moore, No. 95,973 (Sup. Ct. Fla, 1999). 17, 19

Trop v. Dulles, 356 U.S. 86 (1958). 8

OTHER AUTHORITIES

Hugo Bedau, Death is Different (1987). 8, 9

Craig Brandon, The Electric Chair (1999). 5, 6, 20

Albert Camus, "Reflections on the Guillotine" (1957)
repr. in. London, The Law as Literature (1960). 27, 28

Russell F. Canan, "Burning at the Wire,"
in Facing the Death Penalty (1989). 6, 7, 14

Robert Cover, "Violence and the Word,"
95 Yale L. J. 1601 (1986). 18

Deborah W. Denno, "Is Electrocution an
Unconstitutional Means of Execution?,"
35 William & Mary L. Rev. 551 (1994). 10

____"Are Executions Constitutional?"
82 Iowa L. Rev. 319 (1997). 10

E.L. Doctorow, The Book of Daniel (1971). . ..21, 22, 23, 24, 25

Theodore Dreiser, An American Tragedy (1925). 20, 21, 25

Lonny L. Hoffman, "The Madness of the Method,"
70 Texas L. Rev 1039 (1992). 5

Allen Huang, "Hanging, Cyanide Gas, and the
Evolving Standards of Decency: The Ninth
Circuit's Misapplication of the Cruel and Unusual Clause
of the Eighth Amendment," 74 Oregon L. Rev. 995 (1995). . .16

Alan Hyde, Bodies of Law (1997). 17, 18

Franz Kafka, In the Penal Colony (1914). 25, 26, 27

Michael Madow, "Forbidden Spectacle: Executions,
the Public, and the Press in 19th Century New York,"
43 Buffalo L. Rev. 461 (1995) 13, 17

Kent S. Miller and Betty Doris Miller, To Kill and Be Killed: Case Studies from Florida's Death Row (1989). 12, 13

NY Times, "Innocents on Death Row," Editorial, May 23, 1999. 12

Phillip R. Nugent, "Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution," 2 William & Mary Bill Rts J. 185 (1993). 6

Michael L. Radelet, Post-Furman Botched Executions, http://www.essential.org./dpic/botched.html.. . . . . .15, 16

_Ed., Facing the Death Penalty (1989). 7, 13, 14

Elaine Scarry, The Body in Pain (1985). 9, 11

Tom Tyler, Why People Obey the Law (1990). 15, 16

Richard Wright, Native Son (1940). 20, 21

CONSTITUTION

U.S. Const. Amend. VIII. . . . . .passim

Supreme Court of the United States

No. 99-6723

ANTHONY BRADEN BRYAN,

Petitioners,

versus,

MICHAEL MOORE, Secretary,
Florida Department of Corrections,

Respondent.

BRIEF *AMICUS CURIAE* FOR THE LAW & HUMANITIES INSTITUTE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The Law & Humanities Institute ("LHI") is a not-for-profit foundation concerned with the various inter-relations between law and literature. LHI believes that many complex areas of development in the American legal system can be illuminated by reference to non-legal sources that clarify and complement traditional doctrine.

LHI, in its 20 year existence, has monitored developments in the difficult and always evolving area of Eighth Amendment jurisprudence, specifically in the domain of capital punishment. LHI perceives the "cruel and unusual punishments" clause -- on its terms -- to invite continuing judicial awareness of norms of decency and dignity within the larger American society.

As the state of Florida completes its 75th year using the electric chair to dispatch those convicted of capital crimes and

sentenced to death, LHI recognizes the specific device of electrocution as particularly challenging to the American sense of decency and dignity at the turn of the millennium.

Some of the sources we cite in our Argument discuss the Florida electric chair specifically; others also address electrocution generally. LHI believes that, at its origins, people of good will -- lawyers and non-lawyers alike -- had high hopes for electrocution as an "advance" over existing and ancient methods of capital punishment.

As amicus curiae will show, however, public opinion quickly began to reflect empirical disappointment with the electric chair. Even in times when Americans could support capital punishment itself (and those times seem to run in cycles), electrocution never sustained solid support as a humane technique to complete the state's business in its most awesome role -- the legalized executioner of a human being.

Amicus LHI differs from the parties in this proceeding through its diverse use of source material regarding electrocution. LHI strongly asserts that adjudicators exercising the enormous power of life and death need to be informed of all wise and compelling discussions of the electric chair. Only then can the Supreme Court interpret under its own mandate of "evolving standards of decency" the issue raised by this case.

Amicus has obtained and filed the written consents of the parties to the filing of this brief pursuant to Rule 37(3)(a) of the rules of this Court.

SUMMARY OF ARGUMENT

The Law & Humanities Institute argues that the state of Florida violates the Eighth Amendment, as interpreted by this Court, every time it pulls the switch to release electric charges into the pinioned bodies of condemned individuals. Debate within the Florida supreme court alone indicates increasing distress among the state's judges at repetitive calls upon them to

sanction a method of death that has demonstrably breached even the most dispassionate observer's sense of decency and dignity.

Part I of the brief summarizes the history of Florida's 75-year experiment with electricity, embedding that discussion in the 110-year use of the electric chair in this country. Amicus LHI argues that -- from the origins of the electric chair -- scientists, physicians, philosophers and story-tellers have increasingly questioned the high hopes that greeted the first electrocution. Much changed almost immediately after that event, when William Kemmler's death did not produce the "clean" results people of good will anticipated. From that moment on, knowledgeable observers in many walks of life began to compare electrocution unfavorably to the dominant mode of hanging it was supposed to replace. Instead, authoritative observers -- from actual physicians attending an execution in 1898 to Justice Brennan opining in the 1985 case of Glass v. Louisiana -- have compared electrocution to outmoded and uncivilized methods of "torture," specifically to burning at the stake and drawing and quartering.

The discussion in almost all appellate cases dealing with capital punishment generally assumes that the condemned person has acted violently upon at least one innocent other or -- in the case of treason -- upon the people as a whole. Such crimes cannot and should not be removed from the judicial mind as it assesses electrocution and its effects. But all courts, and especially the Supreme Court, must contemporaneously endeavor to trace the evolving line of decent governmental behavior into the sinews and the senses of even the condemned person. Adjudication in this area necessarily involves the interpreter in the circuitry of pain and the disfigurement of violent death.

Part II argues that this Court's standard of interpreting the Eighth Amendment in capital punishment cases mandates close scrutiny of the concept of "decency," and that such an analysis directs the interpreter to the notion of human dignity. Dignity is itself a multifaceted goal that, when it comes to extinguishing a

human life through legal means, requires minimizing the victim's pain and his body's disfigurement.

Dignity also asks a good deal more of the state in planning its modes of capital punishment. Governments, when taking the lives of human beings, represent their citizens and must consequently act in a dignified manner. It is thus the dignity of the citizens of the state of Florida, as much as it is the dignity of the condemned individual, that must be respected under "evolving standards of decency." The dignity of the state cannot hide behind a method of killing whose only "virtue" is its relative invisibility, invisible as it courses through its victim but never in its disfiguring effects.

Part III argues, using a variety of judicial and academic authorities, that this case raises issues fundamental to the acceptance by the public of law's legitimacy. Electrocution as a means of capital punishment in the year 2000 is no longer tolerable as a component of Eighth Amendment jurisprudence.

In the concluding Part IV, amicus LHI asks the Court to consider as valuable source material on decency and dignity several 20th century reflections on executions by essayists and novelists. Amicus argues that, in deciding the issue now before the Court, adjudicators need feel no dissonance between their own frame of reference and that of other powerful indices of evolving norms of civilized behavior.

Fatal currents set in motion by Florida's electric chair must never explode again into the cells and sinews of a human body.

ARGUMENT

I. The Electric Chair: A Disillusioning History

It is now exactly 75 years since the electric chair was installed as the sole means of capital punishment in the State of Florida. (Craig Brandon, The Electric Chair, (1999), p. 219). On August 6, 1990, the use of the electric chair in the country more generally "celebrated its 100th Anniversary" (Id., p. 253). During the course of this long history, the Supreme Court of the United States, as well as a variety of lower courts have considered the constitutionality of the electric chair under the "cruel and unusual punishments" provision of the Eighth Amendment of the United States Constitution. At no time during that period has any court ruled that the electric chair, despite many malfunctions, violated that provision. But occasional voices in this Court (both in majority and dissenting opinions), as well as in the lower courts, have flagged the barbarity and the inappropriateness of this particular method of capital punishment. So have legal commentators. One of them, Professor Lonny L. Hoffman, puts it this way:

> Having abstained from considering the hard questions relating to electrocution for so long, courts bear the onus of re-examining the constitutionality of the century-old method. The judiciary cannot only pronounce sentence; it must also monitor how the sentence of death is carried out... It is a sobering reminder in this age of weapons of mass destruction and killing that how we exact the ultimate sanction of the law matters. Not only for the prisoner, but for ourselves as well. "The Madness of the Method," 70 Texas L. Rev. 1039, (1992), 1042.

Lawyers, law professors, and wise and eloquent commentators from the wider range of American discourse have almost continuously commented on the cruelty, if not the unusualness, of the electric chair. In one of the most striking recent statements, Justice William Brennan dissented to this Court's denial of certiorari in a case challenging the practice. Justice Brennan, joined by Justice Marshall, amassed the empirical evidence and opined that "it is difficult to imagine how such procedures constitute anything less than 'death by installments' -- a form of torture [that] would rival that of burning at the stake," Glass v. Louisiana, 471 U.S. 1080 at 1090 - 91 (1985) citing Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 476 (1947), (Burton J. dissenting).

Associations of prior barbaric forms of punishment with electrocution did not originate in the Supreme Court of the United States. The always uncertain performance of the electric chair was both predicted and subsequently chronicled from the period of the instrument's first use in the New York execution of William Kemmler in 1890. Many reasonable minds at the time earnestly hoped that the electric chair would provide a less painful, disfiguring, and extended form of capital punishment than, for example, hanging. (The Electric Chair, p. 49.) However, it quickly became clear even to these individuals that electrocution would never fulfill its humane potential. At best, the chair provided an unpredictable form of death At worst, it exposed the convicted individual to torture, extended pain, and extreme disfigurement, as the electrocution of William Kemmler itself proved. It was far from painless or instantaneous. "Some witnesses indicated that electrocution appeared to be 'far worse' than hanging, and surmised that the 'electrical experiment' would never again be used as a form of capital punishment." (Phillip R. Nugent, "Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution," 2 William & Mary Bill Rts J. 185, 195 (1993) at p. 196.) "The New York Press stated that the 'age of burning at the stake is past; the age of burning at the

wire will pass also.'" (Russell F. Canan, "Burning at the Wire", Radelet, ed., Facing the Death Penalty (1989), p. 67.) A spokesman for the Buffalo District Attorney stated "'there is no question that unnecessary and revolting cruelty was inflicted upon the unfortunate Kemmler . . . This man, it appears, was made to suffer most horribly, and the first great experiment in this matter could hardly be termed a success." (Nugent, supra at p. 196.)

Only eight years after Kemmler's execution, a physician in New York state who had performed an autopsy on one of the many condemned individuals who now routinely were being electrocuted described the findings of his own autopsy as follows:

> "If the convict is dead, he will stay dead without the autopsy. If he is alive then the autopsy is a crime that outrages decency, a crime a thousand times more horrible then the crime for which the convict sacrifices his life... To be rendered helpless by an electric shock and then disemboweled by doctors before the body is cold is the decree of our 20th-century courts... The profession at large should protest vigorously against performing the legitimate functions of the hangman." The Electric Chair, p. 220.

Dr. O'Neill's observations not only joined those of many others who had witnessed the duration and the physical mutilation connected with the average electrocution, but his reference to drawing and quartering joins the later thought of Justice Brennan, namely that the electric chair in particular harkens back to uncivilized modes of legal life-taking. Dr. O'Neill gruesomely, but according to his own personal experience, adds the observation that death sometimes simply does not occur, no matter how many jolts of electricity are

injected into the body of the condemned. It seems to have been the function of at least an occasional doctor -- during the autopsy -- to administer a "coup de grace" to ensure the actual death of the victim.

Observers of this means of execution outside of the professions of law and medicine have raised their voice as well, representing electrocution as less a new and humane technology of death than an outgrowth of our own Anglo-American tradition and its numerous, creative, and horrifying forms of dealing death to the convicted and the unwanted.

II. "Decency" and "Dignity"

In the case of Trop v. Dulles, 356 U.S. 86, 100 - 101 (1958), this Court established a constitutional standard that a capital method of punishment must be consistent with "evolving standards of decency that mark the progress of a maturing society." The Court asserted that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man." The Eighth Amendment terms "cruel and unusual," together with Trop v. Dulles, virtually require a court of final jurisdiction in capital punishment matters to look to all available sources of wisdom about the state's ultimate act, the taking of a human life. As the Court said in Trop, the "scope [is] not static" but constantly changing. A distinguished commentator on capital punishment, Hugo Adam Bedau understands the Court to be saying:

> "Cruel and unusual punishment" is... not a rigidly designated term, in the way it has been argued that names of naturally occurring species (for example "tiger") or inert natural kinds (for example, "diamond") are. The sense of "cruel and unusual punishment" has to be taken from the properties of those punitive acts and practices

> that have been judged to be morally unacceptable in a particular historic time and culture. Bedau, Death is Different (1987), p. 105.

And the United States Court of Appeals for the Ninth Circuit has very recently seen this Court to require constant scrutiny of the various methods states may try from time to time, a scrutiny that mandates the widest possible survey of social commentary and sources. See LaGrand v. Stewart, 173 F.3d 1144 (9th Cir. 1999).

The evolution of "decency" in our society, when applied to the governmental act of execution, involves first and foremost the Court's own value of "dignity". The issue, most cogently stated, becomes "Is electrocution consonant with the goal of dignity?" In answering this question, the Court must consider the dignity both of the condemned person facing the electric chair *and* the dignity of the citizens of the state of Florida, which has consciously designated electrocution as its mode of capital punishment.

This Court's emphasis on "decency"and "dignity" mandates scrutiny of the possibility of prolonged pain, extreme disfigurement, and the needless psychological and physical torture connected to known defective methods of capital punishment.

A. Electrified Pain: the Visible and the Invisible

How are we to gauge pain? As is true of all trauma, pain is exceptionally difficult to put into words; as Elaine Scarry puts it, "Ordinarily there is no language for pain... [It] (more than any other phenomenon) resists verbal objectivity." (Scarry, The Body in Pain (1985), p. 12.) It is especially important for judges to be sensitive to the pain that even the most reviled of our fellow human beings must endure through the conscious workings of the state. No one else will speak the unspeakable. No judge can

be immune from the difficult and undesirable task of achieving a form of empathy with the pain experienced even by those who may have caused extreme pain to others. But this is the price of an increasingly civilized scrutiny of our governmental practices. If the Ninth Circuit in La Grand has judged lethal gas to cause unconstitutional levels of pain, so doctors and others have observed what appears to be extreme pain, expressed through the body movements of the deliberately and forcibly muted victim of electrocution.

Law professor Deborah W. Denno, who has reported considerable medical data about electrified pain (see e.g., Denno, "Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century," 35 William & Mary L. Rev. 551 (1994)), has found the method constitutionally wanting. Thus, "the most recent research and eyewitness observations suggest that a wide range of factors associated with an electrocution, such as severe burning, boiling body fluids, asphyxiation, and cardiac arrest can cause extreme pain when unconsciousness is not instantaneous. . . [E]ven a routine electrocution can cause torture and a lingering death because of human error, a lack of experience and knowledge, or machine malfunction. . . [T]he human skull can insulate the brain from an electric current, thereby preventing the current from penetrating the brain to cause unconsciousness or to destroy nerve activity. Because the electric current stimulates each muscle to full contraction, the prisoner cannot move even when the current is momentarily turned off, 'a physiological effect that, in itself, is enormously painful and further prevents the prisoner from crying out or providing other outward signs of other massively painful effects of electrocution such as third degree burns and an enormous heating up of bodily fluids throughout the body.'" Denno, "Are Executions Constitutional?" 82 Iowa L. Rev. 319, 356 - 57 (1997), citing medical testimony (id., at 356 notes 220 - 28).

Yet, it is easy to forget -- even in a moment of judgment about the Eighth Amendment -- the temporal experience of pain endured by a convicted capital criminal. As Scarry puts it more generally, "the relative ease or difficulty with which any given phenomenon can be *verbally represented* also influences the ease or difficulty with which that phenomenon comes to be *politically represented*... But the sentient fact of physical pain is not simply somewhat less easy to express than some [other] event, somewhat less visible... but so nearly impossible to express, so flatly invisible that . . . even where it is virtually the only content in a given environment, it will be possible to describe the environment as though pain were not there." (The Body in Pain, supra, p. 12.)

In the case of electrocution, the natural propensity to ignore or to devalue someone else's pain may have helped otherwise civilized observers to tolerate it for 110 years. Even if a body twisting next to a visible rope as it chokes to death cannot be ignored, electrocution -- unlike every other means of capital punishment -- is invisible to the non-victim as it courses "cleanly" through the human body. Therefore, it is understandable that a court might be distracted from thinking of electrocution's pain and instead wish to emphasize society's rationalized termination of the life of a murderer, one who has after all inflicted pain on an innocent victim.

Invisible and apparently subcutaneous, electrical death greatly appealed to even very enlightened jurists and scientists of the late 19th century. But the earliest executions disabused these optimists of their hopes. Even at its best, the device of the electric chair finally revealed its particular form of violence. When the chair was defective, or the procedure was "botched," electricity proved to be a hideous means of death, so that many of the condemned required three, four, and sometimes five jolts of electricity, inflicting increasing burns to the skin, with fire leaping from the scalp, and the fingernails drilled through hands and other limbs in pain.

The Eighth Amendment, as interpreted by this Court, requires attention to what is usually suppressed and missing from the discourse about capital punishment -- the pain of others, the pain of the least among us. Recent forensic science has brought about the release of 79 men and women from death row since 1973 (NY Times editorial May 23, 1999), but even if most condemned people are guilty, they deserve the dignity and the decency of a process of death that minimizes the probability of pain.

Looking at the constitutional standard of evolving notions of human decency, therefore, courts must condemn electrocution on grounds connected to pain. Justice Brennan, joined by Justice Marshall in their dissent to the denial of certiorari in Glass, quoted Justices Stewart, Powell, and Stevens, to the effect that "first and foremost, the Eighth Amendment prohibits 'the unnecessary and wanton infliction of pain.'" Glass, citing Gregg v. Georgia, 428 U.S. 153, 173 (1976). Of electrocution it has been said by the writers of case studies from Florida's death row as well as experiences they observed in other states:

> Electrocution may involve excruciating pain as well as physical violence, mutilation of the body, burning of the flesh, etc. Several recent executions required considerable time. In 1985 it took an executioner in Indiana 20 minutes and five surges of electricity to kill William Vandiver, who had refused to appeal his death sentence, saying only that he wished to die in peace. Alabama's 1983 execution of John Evans necessitated the better part of an hour, numerous jolts of electricity, with an electrode on the leg exploding and being destroyed in smoke and fire. Observers described it as torturing him to death. Kent S. Miller and Betty Doris Miller, To Kill

and Be Killed: Case Studies from Florida's Death Row, (1989), pp. 57 - 58.

A mode of punishment that is incapable of providing requisite levels of dignity as to its infliction of pain must inescapably challenge evolving notions of decency, thereby rendering that mode of capital punishment archaic and constitutionally infirm.

B. Disfigurement

Co-equal with pain is a concern for disfigurement. Indeed, the move from outmoded means of execution -- such as stoning, garreting, and flaying -- had as much to do with society's desire to resist the victim's disfigurement as with the minimization of his pain. England and America, too, had consistently resisted the relatively painless device of the guillotine because of the inevitable marring of the human body involved in that technique. (See, e.g., Michael Madow, "Forbidden Spectacle: Executions, the Public, and the Press in 19th Century New York," 43 Buffalo L. Rev. 461 (1995) at 535.) But electrocution inevitably inflicts a terrible disfigurement on its victim.

The deformations and disfigurements caused by electrocution, perhaps even more so than by gas, LaGrand, supra, evoke outmoded forms of capital punishment and torture such as burning at the stake. Electrocution desecrates the human body, for when a body is electrocuted

> 2000 volts of electricity shoot through a human being and make his body leap and cringe. The condemned's eyeballs can literally pop out of the socket. The face as well as the fingers, legs and toes become hideously contorted and disfigured. It is not unusual for the prisoner to defecate and urinate during the surge of current. The

> vomiting of blood and saliva is common. The prisoner actually smolders under the force of the current, and the temperature of the brain approaches the boiling point of water. Doctors who have performed autopsies of electrocuted men report that the liver is so hot that it cannot be touched by a human hand. (Radelet, ed., Facing the Death Penalty, pp. 67 - 68.)

In 1990, the Florida electric chair malfunctioned causing six inch flames to erupt from the headpiece supplying life-depleting electricity to the body of Jesse Joseph Tafero. (Michael L. Radelet, "Post-Furman Botched Executions," http://www.essential.org./dpic/botched.html.) Throughout the decade of the 90's, Florida continued to experience a virtually inevitable series of undignified, inhumane, and indecent electrocutions. The increasingly obvious barbarity of this particular method of execution contributed to the vast reduction during this period in the number of states permitting, much less dictating electrocution as their means of capital punishment. "By the mid-1990's two thirds of all executions that had taken place since the death penalty was restored took place in only five states: Texas, Florida, Virginia, Louisiana, and Georgia... All the states in the east and west that once used electric chairs have shut them down for good." (The Electric Chair, pp. 254-255.) Yet Florida proceeded throughout the decade of the 90's to employ a means of execution whose specific features could now clearly be defined in terms of pain, torture, disfigurement, and indignity.

After the horrifying electrocution of Tafero in 1990, the Florida Department of Corrections investigated what went wrong and found that a synthetic sponge was used in the headpiece of the execution apparatus. Despite three strong dissenting opinions in the case of a subsequent condemned man on Florida's death row, opinions that detailed in the Florida Reporter the grizzly effects of the chair on Mr. Tafero's entire body, Buenoano v.

State, 565 So.2d 309, 310 - 11 (Fla. 1990), no hiatus was imposed on Florida's electrocutions. On March 25, 1997, Florida executed Pedro Medina. As was true of many electrocutions in the state over its 75 - year history, so here numerous observers attested to the hideousness of the procedure.

> "With the first jolt of electricity, blue and orange flames sparked from the mask covering Medina's face. Flames up to a foot long shot out from the right side of Medina's head for six to ten seconds." (www.essential.org/dpic/botched.html, supra.)

The pathologist who conducted the autopsy found that

> 1. The head had a "burn ring" on the crown of the head that was common in executions by judicial electrocution.
> 2. Within the "burn ring" there was a third degree burn on the crown of the head, with deposits of charred material...
> 3. There was a first degree burn of the upper front of the face and head, caused by scalding steam. (Jones v. State, 701 So2d 76 (Fla. 1997), Shaw, J., dissenting, pp. 86 - 87.)

A society that tolerates such disfigurement cannot be described as civilized.

III. The Legitimacy of Law and the Barbarity of Electrocution

The legitimacy of law depends, in part, on the widely shared sense that how legal officials act and how they do what they do is both legally appropriate and fair. (See Tom Tyler, Why People Obey the Law (1990).) Tyler suggests that "People

are more responsive to normative judgments and appeals than is typically recognized by legal authorities" (p. 178). While Tyler did not study executions and people's reactions to them, his findings have clear and important implications for the practice of electrocution.

However full of optimism was the early thinking about electrocution as a technology for taking life, today it is outmoded. It is no longer the technology best able to minimize the risk that execution will impose unnecessary pain or disfigurement and thus be incompatible with evolving standards of decency. As the Supreme Court put it, in order to be constitutional, methods of execution must not impose "something more than the mere extinguishment of life." (In re Kemmler, 136 U.S. 436 (1890) at p. 447). Because electrocution today involves more than "the mere extinguishment of life" it is no longer able to satisfy the normative basis of legal legitimacy.

"When our government takes the life of one of its citizens, constitutional doctrine correctly commits it to do so in as humane a fashion as is possible. Electrocution is no longer a humane method of execution. From hanging to electrocution, from electrocution to lethal gas, from electricity and gas to lethal injection, execution has moved, though not uniformly, from one technology to another." (Allen Huang, "Hanging, Cyanide Gas, and the Evolving Standards of Decency: The Ninth Circuit's Misapplication of the Cruel and Unusual Clause of the Eighth Amendment," 74 Oregon L. Rev. 995 (1995).)

The development of technology regularly renders previously acceptable methods of execution barbaric, or simply archaic. Thus, as one judge recently said about death by electrocution, "Execution by electrocution is a spectacle whose time has passed -- like the guillotine or public stoning or burning at the stake....Florida's electric chair, by its own track record, has proven to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber of Florida State Prison." (Jones v. State, supra, Shaw. J., dissenting, p. 87). As a Federal

District Court in Arkansas recently put it in upholding the constitutionality of lethal injection, "There is general agreement that lethal injection is at present the most humane type of execution available and is far preferable to the sometimes barbaric means employed in the past." (Hill v. Lockhart, 791 F. Supp. 1388, 1394 (1992).) As Judge Anstead stated in adjudicating the case below on whose authority the present Petitioner stands ready for electrocution, "[j]ust as electrocution may have been originally evaluated in comparison with hanging, we know today that the overwhelming majority of death penalty jurisdictions have long since rejected use of the electric chair and have turned to lethal injection as a more humane punishment." (Provenzano v. Moore, No. 95,973 (Sup. Ct. Fla, 1999), Anstead, J., dissenting, pp. 70-71.)

Where the courts fail to see in the Eighth Amendment the requirement that the technology used by the state to take life must keep pace with the ability to execute in the least painful and disfiguring ways possible, they threaten to undermine one pillar of legal legitimacy. Whereas at other times and in other countries the technologies of execution deployed by the government were valued precisely because of their gruesome effects on the body of the condemned, today under the guidance of the Eighth Amendment "executions. . . [have been] progressively stripped of their ritualistic and religious aspects . . . [A]s Americans developed a keen dread of physical pain, medical professionals teamed up with...engineers to devise a purportedly 'painless' method of administering the death penalty. . . .The condemned man. . . . had now become simply the object of medico-bureaucratic technique -- his body read closely for signs of pain. . . .The overriding aim of the state functionaries charged with conducting executions nowadays is to 'get the man dead' as quickly, uneventfully, impersonally, and painlessly as nature and science permit." (Michael Madow, "Forbidden Spectacle", 43 Buffalo L. Rev. supra, p. 469.)

Succeeding in this aim is crucial in terms of its impact on the legitimacy of law. At least one scholar argues that the requirement that execution be painless "follows a common pattern in which the humanistic, sentimentalized body in pain emerges as a site of empathy and identification" in the 19th and 20th centuries. Alan Hyde, Bodies of Law (1997), p. 192. Sentimentalizing the body of the condemned establishes, Hyde rightly notes, a bridge between the criminal and the public. The criminal, no matter how horrific his deeds, is like us in his body's "amenability to feeling." (Id., p. 193.) The concern that punishment not inflict physical pain or excessive disfigurement explains the fact that "electrocution, gas chambers, lethal injections are each introduced with tremendous fanfare as a painless form of death, until each is revealed to promote its own kind of suffering on the way to death." (Id.)

When fulfilling their responsibility to adjudicate capital punishment disputes under the Eighth Amendment, this Court has recognized its responsibility to apply the norms of contemporary American society to "evolving standards of decency." Understanding that, in such cases, "legal interpretation takes place in a field of pain and death" (Robert Cover, "Violence and the Word," 95 Yale L. J. 1601 (1986)), members of this Court have found common ground in linking Eighth Amendment adjudication to an ability to weigh one kind of death against another.

This commonality in Eighth Amendment norms was put vividly on display in Justice Scalia's response to Justice Blackmun's dissent from a denial of certiorari in Callins v Collins, 510 U.S. 1141 (1994). In that dissent, Justice Blackmun announced that he no longer would "tinker with the machinery of death" (Id. at p. 1145) and that he would, as a result, vote against the death penalty in all subsequent cases. Justice Scalia agreed that Justice Blackmun described "with poignancy the death of a convicted murderer by lethal injection" (Id., at p. 1142) but opined that compared with "the murders that regularly

come before us -- the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern, " death by lethal injection "looks pretty desirable next to that." (Id.) "How enviable," Justice Scalia continued, "a quiet death by lethal injection compared with that!" (Id. at p. 1143.)

Death by electrocution in the state of Florida is more comparable to violent, unpredictable murder than to any "quiet death." As Judge Shaw observed, "The color photos of Davis depict a man who -- for all appearances -- was brutally tortured to death by the citizens of Florida... Each botched execution cast(s) the entire criminal justice system of this state -- including the courts -- in ignominy." (Provenzano, supra, Shaw, J. , dissenting, p. 65.) Execution, guided by the restraining hand of law, should be rational, purposive, and proportional; the violence to which it responds is, in contrast, often irrational, anomic, excessive. In the face of scientific "progress" the Eighth Amendment can no longer condone the continuing use of archaic technologies in executions and still retain the dignity and respect of citizens.

IV. When We are Made to See the Invisible: Stories About Execution and Electrocution

As this brief discussed in Part II, supra, electricity provides a deceptively invisible force of death. The current flows under the condemned person's flesh. Comforting to even the least retributive of onlookers, subcutaneous annihilation conceals more than it reveals. Thus, even though so many "botches" finally expose the hideous effects of the electric chair on the human body, there remains a haven of invisibility that protects the onlooker from the full experience of another's violent death. Added to this is the faulty assumption that pain is not occurring because it, too, lies beneath the supposedly unconscious distortions of the electrified brain and body.

Where appearances deceive, story-tellers reveal. Just as the "fictions of the law" permit legal resolution to occur in many cases, so fiction about the law helps adjudicators to fathom the phrase "cruel and unusual punishment" -- even where positivistic and empirical experience provides an unacceptable if quite narrow escape hatch from reality.

A. American Novelists on Electrocution

On March 30, 1908 New York State electrocuted Chester Gillette for murdering Grace Brown, his pregnant girl-friend. The Electric Chair, p. 216. Some years later, the great American novelist Theodore Dreiser translated the story of Gillette and Brown into one of our century's classics, An American Tragedy (1925). Dreiser's character Clyde Griffiths, a social climber modeled on Gillette, dies in the electric chair, which is depicted three times in the novel doing its lightbulb - dimming, dreadful, inhuman work. Dreiser set in motion a century-long tradition in American letters of bringing readers face to face with electrical death.

Richard Wright, in his 1940 novel Native Son, also depicts a full capital criminal proceeding that ends with electrocution. The state is Illinois, the charge is murder, and the accused is Bigger Thomas. Bigger, who is black, has killed a white woman. It is quite unclear that he has acted with pre-meditation.

Yet the grand jury indicts Bigger for capital murder. If convicted and sentenced to the extreme penalty under the charge, Bigger will be electrocuted. As he leaves the court house after being indicted,

> A huge throng of people covered the pavement. The wind blew hard. Out of the shrill pitch of shouts and screams he caught a few distinct words:

". . . turn 'im loose . . . ."
". . . give 'im what he gave that girl . . . ."
". . . let us take care of 'im. . . ."
". . . burn that black ape. . . ." (Wright, Native Son, p. 309)

Bigger, who is represented passionately if perhaps injudiciously by the lawyer Max, is convicted and doomed to electrocution. Richard Wright spares his reader too much detail relating to Bigger's execution, but the means of punishment decidedly interweaves with the larger subject of injustice in the novel.

Three decades later E. L. Doctorow described what the public, and even many experts, always wanted to believe about electrocutions. In his novel, The Book of Daniel, Doctorow points to the misconception that "it's very painless, it's very fast and it doesn't hurt." The Book of Daniel (1971), p. 243. However, Doctorow later goes on to give what proved to be the more accurate description, that electrocution is not painless, and neither is it fast, and neither will the condemned necessarily be saved from repetitive attempts, because often the first jolts simply do not suffice:

> The Warden was highly agitated... The executioner went back behind the wall, and again received a signal and again turned on the current. Later he said that the first "dose" had not been enough to kill..." Id, p. 315.

Like Dreiser, Doctorow was imaginatively recreating an actual execution. One of Dreiser's convicts needed three jolts, separated over 90 seconds. An American Tragedy, p. 773. In the case represented by Doctorow, it took five separate jolts of electricity to kill the convict.

Doctorow's depiction of electrocution gains particular force because the narrator of The Book of Daniel is the son of not one, but two condemned criminals. This perspective humanizes and personalizes the fate even of Julius and Ethel Rosenberg, whom the federal courts had convicted of espionage and sentenced to die in New York's electric chair.

The boy recounts his parents' executions:

> My father's hands were raised, and separated, and his arms strapped at the wrists to the arms of the chair. The arms of the electric chair are wood. The frame is wood, although a metal brace rises from the back of the chair and the chair is bolted to the concrete floor with metal braces. His ankles were strapped to the chair. The chair straps are leather. A strap was tied across his lap, another across his chest, and another, like a philactery, around his head. A guard gently removed his eyeglasses, folded them and put them aside. A guard came over, dipped his fingers into a jar, and with a circular motion rubbed an adhesive and conduction paste on the shaved place on my father's head, and then kneeled down and did the same for the place on his cap that had been shaved. Then the electrodes were fixed in place.
>
> Electricity flows in circuits. If the circuit is open or incomplete, electricity cannot flow. In electrocution the circuit is closed or completed by the human body. My father's lips were sucked up between his teeth as the hood came down over his face, every last tremor of his energy gathered in supreme effort not to cry out. The hood is black leather and is offered in respect for

the right to privacy at the moment of death. However, it is also possible that the hood is placed on the head to spare the witnesses the effect to the musculature and coloration of the face, and the effect to the organs of the face, the tongue, the eyes, of two thousand five hundred volts of electricity. My father's hands gripped the wooden chair-arms till it seemed they could squeeze them to sawdust. The chair would kill him but at this moment it was his only support. The executioner took his place behind a protective wall in a kind of cove. On the wall in this cove was a large handled forklike switch. The switch is thrown from an up position to a down position. The executioner looked through a glass panel, and observed the warden observing my father. Waiting a moment too long the warden turned to the glass panel and nodded. The executioner threw the switch. My father smashed into his straps as if hit by a train. He snapped back and forth, cracking like a whip. The leather straps groaned and creaked. Smoke rose from my father's head. A hideous smell compounded of burning flesh, excrement and urine filled the death chamber. Most of the witnesses had turned away. A pool of urine collected on the cement floor under the chair.

When the current was turned off, my father's rigid body suddenly slunk in the chair, and it perhaps occurred to the witnesses that what they had taken for the shuddering spasming movements of his life for God knows how many seconds was instead a portrait of electric current,

> normally invisible, moving through a field of resistance. (Id., pp. 313-14.)

Everything real about electrocution -- including its violence and also its deceptive invisibility -- emerges from this fictionalized account, which continues with the boy's description of the electrocution of his mother:

> My mother turned her back to the chair, disdaining any helping hand. She hugged the matron who had guarded her alone in the woman's death cell block for two years. They had become dear friends. The matron wept and ran out of the chamber. My mother, still with her peculiar smile, sat down in the electric chair and observed the strapping in of herself like a passenger in a plane getting ready for a journey. When the hood went over her eyes they were open. When the switch was thrown she went into the same buzzing spluttering arc dance. The current was turned off. The doctor came over to the slumped body and listened for a heartbeat with his stethoscope. He expressed consternation. The electrocutioner came out of his cove and they conferred. The warden was highly agitated. The three reporters communicated in urgent whispers. The executioner went back behind the wall, and again received a signal, and again turned on the current. Later he said the first "dose" had not been enough to kill my mother Rochelle Isaacson. (Id., pp. 314-15.)

This narrative defamiliarizes an assessment of electrocution by placing the account in the mouth of one who has

been orphaned by his own government. Yet Daniel's uncompromisingly accurate account of his parents' deaths does not impose blame on anyone. The guards are gentle, the warden and the doctors seem concerned about the way the electric chair is functioning.

In Doctorow's depiction, it is as though the means of legalized death had progressed beyond the control of any human agent. (And had not Dreiser seen the "death house" itself as "one of those crass erections and maintenances of human insensitiveness and stupidity principally for which no one primarily was really responsible?" (An American Tragedy, p. 758.)

This Court, however, with such descriptions legitimately on the record, cannot delegate or defer responsibility. Thankfully, as the century of American literary interest in electrocution wanes, this Court has the opportunity to recapture civilized control over a mechanism that has run amok.

B. Kafka and Camus on the Essence of Execution

Like the Americans, but even earlier, Europe's writers perceived the mechanisms of legalistic death to have overtaken the common humanity of executioner and executed alike. In 1914, Franz Kafka wrote his classic story, In the Penal Colony, a graphic description of the effects of capital punishment on the body of the condemned individual. Almost a quarter-century after New York's first electrocution, and ten years prior to Florida's initiation into electric death, Kafka was describing an eerily similar death, but without the shield of electricity's subcutaneous deviousness:

> "It's a remarkable piece of apparatus," said the officer to the explorer [who] seemed to have accepted merely out of politeness the Commandant's invitation to witness the execution of a soldier condemned to death for

> disobedience and insulting behavior to a superior. Nor did the colony itself betray much interest in this execution. . . . [T]here was no one present except the officer, the explorer, the condemned man, who was a stupid-looking, wide-mouthed creature with bewildered hair and face, and the soldier who held the heavy chain controlling the small chains locked on the prisoner's ankles, wrists and neck, chains which were themselves attached to each other by communicating links.

Kafka's description of the machinery of death continues its uncanny evocation of both the process of strapping someone to the electric chair and of electricity itself -- but it is electricity rendered visible. The "apparatus" -- as shamefully flawed as Florida's chair -- runs on "an electric battery". While Kafka declines specifically to represent an electric chair, the following account, virtually from start to finish, provides a ruthlessly honest foreshadowing of "cruel and unusual" electrocutions:

> "Needles are set in like the teeth of a harrow and the whole thing works something like a harrow, although its action is limited to one place. . . . On the Bed here the condemned man is laid -- . . . One of the cog wheels in the Designer is badly worn; it creaks a lot when it's working; you can hardly hear yourself speak; spare parts, unfortunately, are difficult to get here. . . . On this cotton wool the condemned man is laid, face down, quite naked, of course; here are straps for the hands, here for the feet, and here for the neck to bind him fast. Here . . . is this little gag of felt, which can be easily regulated to go straight into his mouth. It is meant to keep him from screaming and biting his tongue. Of course the man is forced to take the felt into his mouth, or otherwise his neck would be broken by the strap. . . . As soon as the man is strapped down, the bed is set in motion. It quivers

> in minute, very rapid vibrations, both from side to side and up and down. . . . The movements are all precisely calculated."

At the moment of death, the needles puncture the condemned person's flesh. Although "it was working so silently, the machine simply escaped one's attention," the "badly worn" parts of the instrument malfunction and finally call attention to what would otherwise seem tolerable. Eerily evoking Florida's electric chair, the always prophetic Kafka recounts the horrifying end of the prisoner's life:

> . . . [T]he bed was not turning the body over but only bringing it up quivering against the needles. The explorer wanted to do something, if possible, to bring the whole machine to a standstill, for this was no exquisite torture such as the officer desired, this was plain murder. . . . [T]he harrow rose with the body on it and moved to the side. . . . Blood was flowing in a hundred streams, not mingled with water, the water jets too had failed to function. And now the last action failed to fulfill itself. . . .

Kafka and other writers refuse to abstract the condemned person from the pre-ordained death that works upon him. Story-tellers also decline to preserve the shadows that often fall on capital punishment. So Albert Camus, in "Reflections on the Guillotine" (1957), refuses to let "our condemned criminals die by rote in the name of a theory in which their executioners no longer believe." He goes on:

> When the Nazis staged public executions of hostages in Poland, they first gagged their prisoners with rags soaked in plaster so they

> could not cry out some final word of liberty or rebellion. It may seem an effrontery to compare the fate of these innocent victims with that of our condemned criminals, but apart from the fact that it is not only criminals who are guillotined in France, the method is the same: we gag our guilty with a stuffing of words, though we cannot justly affirm the legitimacy of their punishment unless we have first considered its reality. Instead of saying, as we always have, that the death penalty is first of all a necessity, and afterwards that it is not advisable to talk about it, we should first speak of what the death penalty really is, and only then decide if, <u>being what it is</u>, it is necessary. (Emphasis in original.)

Electrocution -- <u>"being what it is"</u> -- will not survive as a means of execution one second beyond considered reflection on its real nature. So, a generation after Camus's essay, France in 1981 did away with the guillotine. That decision, and France's abolition of all means of capital punishment, were affirmed by their high constitutional court in 1985, relying in part on Protocol 6 of the European Convention on Human Rights. Similarly, New York and Illinois long ago rejected the electric chair.

But this Court finds itself still in the business of micro-managing the electrical instrumentality of death. In the name of the dignity of the condemned men and women on Florida's death row, in the name of the dignity of the citizens of the states that still use electrocution, we beg the Court to end this barbarism.

CONCLUSION

The Eighth Amendment's prohibition upon "cruel and unusual punishments," as interpreted by this Court and applied to the best current wisdom about electrocution, mandates the finding that Florida's electric chair is an unconstitutionally undignified means of capital punishment.

Respectfully submitted,

Edward de Grazia
(Counsel of Record)
The Law & Humanities Institute
757 Third Avenue, 18th floor
New York, NY 10017
(212) 790-0276

Richard Weisberg
(On the Brief)
Benjamin N. Cardozo
School of Law
55 Fifth Avenue
New York, NY 10003
(212) 790-0299

Austin Sarat
Department of Political Science and
Law, Jurisprudence Social Thought
Amherst College
Amherst, MA 01002
(413) 542-2308